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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH P. RUSSO, ANTHONY RUSSO
and JOSEPH MONTELEONE, SR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTION PRESENTED

This Court, in *Kyles v. Whitley*, 514 U.S. 419 (1995), held that the "materiality" of a *Brady* violation is not to be judged by a "sufficiency of the evidence test" but, rather, whether the withholding of *Brady* material "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 435. Thus, the sole question presented by this Petition is:

> Whether a federal appellate court, in applying the *Kyles* test to reject a *Brady* claim can consider "the strength of the independent evidence" of guilt, rather than whether the effect of "withholding *Brady* material" undermines the confidence in the outcome of the trial?"

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PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari

The Petitioners, Joseph P. Russo, Anthony Russo and Joseph Monteleone, Sr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this proceeding.

Opinion Below

The Second Circuit issued its judgment and opinion on June 3, 1998. The opinion is reported at 145 F.3d 551 (2d Cir. 1998), *sub nom United States v. Orena*. It is reprinted in the Appendix hereto (A. 3). The Court reversed the opinion of the trial court which is reported at 1997 WL 867788

(E.D.N.Y., Mar. 13, 1997) (No. CR-92-0351(CPS)), *sub nom United States v. Persico*, and is reprinted in its redacted form in the appendix hereto.[1] (A. 23).

Jurisdiction

The Second Circuit issued its judgment and opinion on June 3, 1998 and on August 26, 1998, it denied a Petition for Rehearing, as well as a Suggestion of Rehearing *in Banc*. *See* (A. 1). This Petition is filed within 90 days of the date of the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c),(d):

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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[1] The opinion of the Honorable Charles P. Sifton, Chief Judge of the United States District Court for the Eastern District of New York, is over 100 pages long and deals with a host of issues and other defendants which bear no relationship to this petition for a writ of certiorari. As a consequence, only that portion of the opinion that bears directly on the question presented by this petition is reprinted.

Statement of the Case

On May 13, 1993, a fifteen-count superseding indictment was returned against Petitioners Joseph P. Russo, Anthony Russo and Joseph Monteleone, Sr., as well as twelve other defendants (A. 5). They were charged with violating, and conspiring to violate, the Racketeering Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1962(c), (d) (A. 5). Essentially, Petitioners were charged — both as predicate RICO offenses and as separate substantive offenses — with conspiracy to murder two members of an opposing faction of the Colombo crime family in New York — John Minerva and Michael Imbergamo (A. 5).

The murder charges stemmed from an internal conflict which allegedly arose between two competing groups of the alleged Colombo crime family which persisted from 1991 through the end of 1994 (A. 5). The government claimed that during this period, those loyal to the acting boss of the family, Carmine Persico, Jr., who was serving a prison sentence, were pitted against the acting head of the family, Victor Orena and his collaborators (A. 5).

The actual shooting between the factions allegedly started in November of 1991 (A. 26). In March 1992, John Minerva and Michael Imbergamo, who allied themselves with the Persico faction, were killed outside Minerva's cafe on Long Island (A. 7). As indicated, Petitioners were accused of committing these homicides. There was no participant testimony identifying the person or persons who shot the two men (A. 28).

Virtually all the prosecution's evidence concerning the Minerva-Imbergamo homicides was based upon the questionable testimony of four accomplice witnesses — which in turn was based upon hearsay information obtained from one Gregory Scarpa, Sr., an alleged member of the Persico faction (A. 6, 60-61). The "Scarpa hearsay" was filtered through the voices of these accomplice witnesses under the guise of co-conspirator statements (A. 33-35).

In order to establish the admissibility of the "Scarpa hearsay" the government, throughout the trial, depicted Gregory Scarpa, Sr. as a co-conspirator and a participant in the war aligned with Persico's side (A. 23-24, 32). The evidence produced at trial attributed several significant acts of violence to Scarpa. Petitioners tried to attack the credibility of the accomplice witnesses and the lack of hard evidence to connect them to the Minerva-Imbergamo homicides (A. 8, 35-36). They argued that Sessa's testimony evidenced a "Scarpa/Sessa" war, provoked by both men's own personal motives (A. 8, 35-36). It was contended that the theory of a Persico/Orena faction was an after-the-fact rationalization of what occurred (A. 8). The defense asked the jury to infer that Scarpa and Sessa were the perpetrators of all the killings — including the Minerva-Imbergamo homicides (A. 8). But, during the trial they had no hard evidence to support these arguments because the crucial verification they needed to support these assertions had been withheld by the government (A. 12 n. 3).

On April 20, 1994, after a ten week trial, Petitioners Joseph and Anthony Russo, and Joseph Monteleone were found guilty of the RICO murders of John Minerva and Michael Imbergamo (A. 23). But, shortly after Petitioners' trial, in response to a discovery request by defense counsel in an unrelated case, prosecutors for the first time disclosed that Gregory Scarpa was, in fact, *a government informant*, and had been since at least 1980 (A. 9). These stunning revelations demonstrated that Scarpa had provided substantial information to the government during his time as an informant, including information regarding the war between the two competing factions (A. 9).

More significantly, for purposes of this Petition, Judge Sifton found that the government's information disclosed that Scarpa had misrepresented his own involvement in several murders, which he either attributed to the "Persico faction" — without identifying himself as a part of the faction which committed the murders — or he falsely blamed the murders on someone else (A. 9). Even more significantly, the district

court found that these murders were "indisputably committed" by Scarpa (A. 59). The government never challenged, in the Second Circuit, this critical finding made by Judge Sifton (A. 9 n. 2).

Moreover, even the Second Circuit was forced to acknowledge that during Scarpa's years as an informant, his control agent, FBI Agent R. Lindley DeVecchio, may have given Scarpa highly sensitive information that would have helped Scarpa to wage war against the Orena faction and avoid arrest for his own criminal activities, as well as to defer the arrest of his associates and his son for their criminal acts (A. 10). Growing suspicions within the FBI, regarding this bizarre and frightening relationship between DeVecchio and Scarpa, reached such proportions prior to the beginning of Petitioners' trial that it triggered an intensive government "internal investigation" (A. 10). See *id.*, 1997 WL 867788 at *12-13.

Significantly, prosecutors were aware both of Scarpa's informant status and of the serious internal FBI investigation prior to the beginning of Petitioners' trial (A. 10). See *id.*, 1997 WL 867788 at *13. And, yet, they never disclosed this vital information to the Petitioners.

During the course of the post-trial motions, when Judge Sifton inquired of the government why this crucial information was not turned over to the Petitioners, the prosecutors tried to excuse their failure to reveal Scarpa's informant status — or the FBI investigation into alleged improprieties by DeVecchio — claiming that somehow they did not believe that this information was *material* under *Brady* (A. 10). 1997 WL 867788 at *13, *16. This significant failure was in direct defiance of the district court's pretrial order, made in response to defense requests for *Brady* material, directing the production of all FBI reports of any

person who knew that Scarpa was working with the government (A. 10). See *id.*, 1997 WL 867788 at *15.[2]

In response to these shocking disclosures made after their trial, the Petitioners filed motions for new trials pursuant to Fed.R.Crim.P. 33 (A. 11). They also moved, under Fed.R.Crim.P. 29, that this unprecedented and "outrageous government conduct" warranted an outright dismissal of the indictment (A. 11).

The District Court Concludes that the Withheld Evidence Undermined the Confidence in the Outcome of the Trial

On February 18, 1997, the Honorable Charles P. Sifton, Chief Judge of the Eastern District of New York, although denying the other defendants' motions for a new trial, granted Petitioners' application. *United States v. Persico*, No. 92-Cr-0351, slip op. (E.D.N.Y. Feb. 18, 1997) (CPS).[3] Applying the *Kyles v. Whitley* standard, Judge Sifton concluded that based upon the failure to disclose to the Petitioners the fact that Scarpa was working as an informant for the Government, his confidence in the counts upon which the defendants were convicted was undermined (A. 59). More specifically, after a review of the Scarpa reports to the FBI released by the government, the district court indicated that its "confidence in the verdict of guilty on these counts is

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[2] It was not until May 31, 1996, in response to the district court's January 1993 Order, that the U.S. Attorney's Office explained this oversight. The Chief of the Criminal Division only then conceded in an affidavit that she had been in personal possession of the so called "Girlfriend 302" at the time of the 1994 trial and now "believe[s] I was unaware at the time [of trial] that I alone within this Office had access to the OPR 302's including the Girlfriend 302" (AA 787).

[3] The district court originally issued a memorandum and order dated February 18, 1997 which was entered February 25, 1997. The court subsequently amended its memorandum in a decision dated March 13, 1997, which was entered on March 22, 1997.

substantially undermined, and a new trial is ordered as to these defendants [Joseph and Anthony Russo and Joseph Monteleone]" (A. 59).

Judge Sifton, exercising great care in his analysis of all the evidence which he had heard during the 10 week trial, carefully cataloged and described how the Scarpa withheld evidence might well have proven useful at the Petitioners' trial. He stressed that based upon this withheld evidence, the Petitioners could have plausibly argued to the jury that "the fact that Scarpa lied to the FBI about some of his murderous activities gives rise to the inference that he lied about this one (the Minerva-Imbergamo homicides) as well" (A. 62).

Although the district court recognized that "[a] substantial amount of evidence" of guilt existed independently of Scarpa's out-of-court statements, the court was convinced that sufficient doubt was cast upon the jury's verdict to require a new trial because of the revelations in which Scarpa blames other members of the Persico faction for murders he "indisputably committed" (A. 59-61). As the government demonstrated at trial, once the shooting in this war began with the attempt on Scarpa's life, Scarpa and his crew killed *three people* and made attempts to kill another (A. 59, 60). Scarpa reported each of these crimes to the FBI, but he did so in a fashion casting blame on others (A. 59).[4] Judge Sifton stressed that "whether this would have been viewed by the jury as the commission of the racketeering act

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[4] The December 11, 1991 209 blamed the Amato, Fusaro and Cacace shootings on the "Persico faction." On January 8, 1992, Scarpa reported that the Grancio murder was committed by the "Persico faction"; on January 14 he identified "Richie Fusco's crew" as the murderers and described the motive as follows: "[T]he source said it was done by Richie Fusco's crew, not only because of Grancio's position, but also because Grancio tried to have Fusco 'hit' several months ago." While the evidence at trial showed that, in January, Scarpa and Mazza attempted to kill Joe Baudanza in order to "set an example" to the Russos and Theodore Persico (Tr. 3770). On February 3, 1992, Scarpa reported to the FBI that "there was a recent attempt to hit Joseph Baudanza by members of JoJo Russo's crew" (A. 60).

by the Russos and Monteleone themselves is not something that I can predict with any confidence" (A. 61).

Judge Sifton observed that the government's serious misconduct in suppressing evidence would have revealed to Petitioners that Gregory Scarpa, Sr., a central figure in the crimes charged, was an FBI informant — and had committed murders with the government's knowledge through one of its own FBI agents. In fact, the district court postulated that, it might have been plausibly argued by the Petitioners that *Scarpa* committed *the very murders* for which they have been convicted. Being able to disclose these critical facts to a jury would have had been devastating — and certainly would have "undermine[d] [the] confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, 435. This is why Chief Judge Sifton's confidence in the jury's verdict was undermined (A. 59).

The Chief Judge, in a 100 page opinion, that took over two years to finalize, stressed that as *Kyles* makes clear, *Brady* involves neither a sufficiency of the evidence test on the one hand nor requires that the defense show, by a preponderance of the evidence, that the outcome would have been different on the other (A. 61-62). The district judge stressed that *Kyles* only "requires instead that the Court perform the much more difficult task of examining the non-disclosures in their entirety in light of the evidence presented at trial to determine whether confidence in the verdict is undermined" (A. 62). And, finally, the district judge emphasized, "Based on the Scarpa 209s discussed above, I find that there is a reasonable probability of a different outcome in this case had the jury been aware of Scarpa's deviousness as revealed in the 209s. Thus, a new trial of these defendants is necessary" (A. 62). The government appealed Judge Sifton's decision to the Second Circuit.

The Second Circuit Reverses Judge Sifton's Factual Findings and Imposes a New Mutation on the *Brady* Rule

Despite this Court's holding that the "materiality" of a *Brady* violation is not to be judged by a "sufficiency of the evidence test" but, rather, whether the withholding of *Brady* material "undermines the confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985) — the Second Circuit altered this strict standard by holding:

> [W]e recognize, again, that the test for materiality "is not a sufficiency of evidence test," *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555, the strength of the independent evidence of appellees' guilt increases the degree of significance that would need to be ascribed to the withheld impeachment evidence in order for it reasonably to undermine confidence in the verdict. Our conclusion that the district court erred in granting a new trial is ultimately based on the fact that the court gave undue weight to the impeachment evidence itself. Defendants already had in their possession absolutely devastating evidence with which to assail Scarpa's credibility. 145 F.3d at 558. (A. 16).

The Court went on to hold:

> It is well settled that where ample ammunition exists to attack a witness's credibility, evidence that would provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial. [citing authority] Accordingly, in light of Scarpa's long and depraved criminal history, his misrepresentations to the FBI about his own involvement in certain murders was merely cumulative evidence of his lack of credibility, or his "deviousness," 1997 WL 867788, at *35 ("Based on the Scarpa 209s discussed above, I find that there is a reasonable probability of a different outcome in this case had the jury been aware

of Scarpa's deviousness as revealed in the 209s."). (A. 17).

The Second Circuit reversed the district court's granting of a new trial and remanded the case to the district court with instructions to enter judgment in accordance with the verdict of the jury (A. 21). A petition for rehearing, as well as their Suggestion of Rehearing *in Banc* was denied on August 26, 1998 (A. 1-2).

Reasons for Granting the Petition

The Second Circuit has created an important question under the *Brady* rule concerning whether, once a *Brady* violation is established, there can be a finding of harmless error based upon a review of the other independent evidence of Petitioners' guilt.

The Second Circuit, acting in direct defiance of the clear language in *Kyles v. Whitley*, 514 U.S. 419 (1995), has drastically diminished the force of the *Brady* rule by looking to the other evidence in the case, which might support the Petitioners' convictions, to determine whether the constitutional limits of that important rule have been satisfied. Under that view, coming as it does from one of the most prominent circuit courts, the *Brady* rule will be radically curtailed and justice throughout the country will suffer.

Thus, in the Second Circuit's words, an established *Brady* violation can be found harmless by scouring the record to find some other independent evidence that supports the jury's verdict. Nothing could be more foreign to the rule announced by this court in *Kyles* — and before that in *United States v. Bagley*, 473 U.S. 667 (1985). This Court stressed, in *Kyles*, that a true *Brady* violation, given the nature of the test for materiality, cannot be harmless. Therefore, the results of the Second Circuit's decision are conflict, confusion and

unfairness in the administration of justice. The court's decision becomes a blind rejection of the very essence of the *Brady* doctrine, without regard to its essential underpinnings and requirements.

As a consequence, the Second Circuit's decision in this case raises several important questions about the proper roles of our courts in assessing *Brady* claims. They are questions of constitutional significance and profound importance. And, as such, they deserve the plenary attention of this Court. And finally, the Second Circuit's decision is such an abrupt departure from the *Brady* rule, by a lower federal court, as to call for "an exercise of the Court's supervisory power" under Rule 10(a) of this Court.

The exercise of this supervisory power is necessitated, because no principle plays a greater role in the administration of criminal justice than the *Brady* rule.[5] It is responsible for correcting more injustices than perhaps any other rule announced by this Court. And, if the true value of the *Brady* rule ever needed commending, it is best illustrated by this case. It is hard to imagine, under any circumstance, a more egregious form of prosecutorial misconduct than that presented by the undisputed facts of this case. Here the government's serious misconduct involved suppressing evidence that would have revealed that Gregory Scarpa, Sr., a central figure in the crimes charged, was in truth an FBI informant — and had actually committed murders with the knowledge of one of its own FBI agents. This constituted the most blatant breach of the *Brady* doctrine conceivable. In fact, the Petitioners could have plausibly argued that Scarpa himself committed *the very murders* for which they have been convicted. Withholding such critical evidence from the Petitioners was a constitutional error, of enormous

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[5] *Brady v. Maryland*, 373 U.S. 83 (1963). Since its inception, the *Brady* rule has either been discussed or cited by this Court in 68 separate decisions and by United States Circuit Courts of Appeal in no fewer than *2,747* decisions. It has been cited or discussed by District Courts 1,882 times.

proportions, by any standard imaginable. As a consequence, no one can seriously question that such a flagrant *Brady* violation can be deemed harmless. *Kyles*, 514 U.S. at 436.

In *Kyles*, a decision that stands as this Court's clearest and most thorough pronouncement on the legal consequences concerning the suppression of *Brady* material, the Court, defined — and reinforced — the crucial principles governing an assessment of the issue of "materiality." The Court held that the primary test is whether the evidence suppressed "undermines confidence in the verdict" — *not* whether sufficient independent evidence exists to support the verdict. *Kyles*, 514 U.S. at 434-35 (emphasis supplied). Furthermore, materiality is established by a showing that the favorable evidence, which was suppressed, could have reasonably "put the whole case in such a different light" so as to weaken confidence in the outcome. *Kyles*, 514 U.S. at 435.

And, finally, it bears repeating that *Kyles* makes clear that *Brady* involves neither a sufficiency of the evidence test on the one hand nor requires a defendant to show by a preponderance of the evidence that the outcome would have been different with the benefit of the suppressed evidence. It requires instead that the Court perform the much more difficult task of examining the non-disclosures in their entirety in light of the evidence presented at the trial to determine whether confidence in the verdict is effected. And yet these guiding principles of *Kyles* were simply ignored by the Second Circuit.

Moreover, the Second Circuit grievously misapprehended the character of the suppressed *Brady* material that was withheld by the government. What was overlooked by the Second Circuit was that these distressing *Brady* defaults were inextricably intertwined with the truth-seeking function of Petitioners' trial — not just impeachment.[6] The prosecutorial

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[6] We are not dealing solely with impeachment material that is merely cumulative or redundant as claimed by the Second Circuit. Thus, the circuit court's reliance on *United States v. Avellino*, 136 F.3d 249, 257-59

(Footnote Continued)

misconduct here is *generic* and harrowing in its implications. The withholding of the Scarpa evidence goes far beyond impeachment. In fact, it directly impugns the merits of the government's case against the Petitioners — as so incisively emphasized by Chief Judge Sifton. The uncovered evidence reveals an orchestrated scheme of misconduct and malfeasance on the part of a federal agent and an informant acting under his authority, of unprecedented proportions that tainted the whole prosecution. While it is true that the Scarpa disclosures may have been extraordinarily useful for impeachment purposes, this information has value above and beyond mere impeachment. It would have been invaluable in establishing a defense that Petitioners had actually been framed by Scarpa.

What was said by this Court in *Kyles* aptly applies to this case: If the withheld evidence, in the hands of capable counsel, would have "put the whole case in such a different light as to undermine confidence in the verdict," then a new trial is warranted. *Kyles*, 514 U.S. at 435. The dark strength of the Scarpa information, revealing governmental misconduct of the most flagrant kind, has accounted for no fewer than three acquittals, involving numerous defendants, in trials where the explosive "Scarpa disclosures" were revealed to the juries. *See United States v. Alphonse Persico*, 92 CR 0351 (S-9) (CPS); *United States v. Cutolo, et al.*, 93 CR 1230 (EHN); *United States v. Victor M. Orena, et al.*, 93 CR 1366 (ERK). The defendants in those trials were charged with similar offenses and their acquittals lend great force to Judge Sifton's conclusion concerning the materiality of the Scarpa disclosures and why his confidence in Petitioners'

(2d Cir. 1998); *United States v. Zagari*, 111 F.3d 307, 320-21 (2d Cir. 1997); *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir. 1996); *United States v. Gambino*, 59 F.3d 353, 366-67 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996); *United States v. Orena*, 32 F.3d 704, 717 (2d Cir. 1994); *United States v. Locascio*, 6 F.3d 924, 949-50 (2d Cir. 1993), cert. denied, 511 U.S. 1070 (1994); *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976), is sadly misplaced — and constitutes a somewhat surprising oversight.

verdicts of guilty was so seriously undermined. It bears repeating that Judge Sifton had the unique experience of observing, first hand, the witnesses and the whole environment of the trial. This is why circuit courts traditionally give great deference to a district court's findings of fact.

When you add to this the effective use of new information regarding Scarpa's illicit relationship with DeVecchio to exclude Scarpa hearsay, its materiality cannot be doubted. Because the government's wrongdoing is of such an extreme nature, the very character of a trial would have been so infected and the taint would have extended deeply into the truth finding process. This is especially relevant where the government's actual *participation* in the wrongdoing is so apparent. Being able to disclose these critical facts to a jury would have had an overwhelming effect on them and certainly leads to the irresistible conclusion that the withholding of this crucial evidence "undermines confidence in the outcome of the trial" — as the district court so judiciously found.

Moreover, if the Second Circuit's decision is left uncorrected, it is bound to sponsor further suppression by prosecutors of other evidence, favorable to a defendant, because the government will know it can always take refuge in the harmless error rule to salvage convictions where vital evidence has been withheld from the defense. This is simply intolerable under the reigning ideology of *Brady*.

This Court's inoculation of a true *Brady* violation against harmless error in *Kyles* and *Bagley* stands as one of its most important remedial actions. Moreover, today when the spread of harmless error through circuit court opinions is reaching epidemic proportions, *Brady's* proscription against covering up prosecution misconduct of the magnitude exemplified by this case through the device of harmless error, stands as the lone sentinel against governmental lawlessness. Furthermore, if this injustice is left uncorrected, it will have urgent implications for the integrity of criminal justice in this

country because such shocking government misconduct degrades the legal process and undermines the integrity of our system of justice.

This is so because regrettably, this Court has witnessed a sad kind of pathology among prosecutors who have consistently suppressed evidence favorable to an accused in order to obtain convictions. For instance, this case exceeds by far what was done to Curtis Kyles in his case. Until prosecutors are taught once and for all that this conduct will not be tolerated, further misconduct is bound to be sponsored. The strength of the *Brady* doctrine is what is needed to put a halt to these misadventures. The Second Circuit's modification of that rule will inevitably inspire further misconduct on the part of prosecutors — instead of curbing it.

Finally, unless reversed, the Second Circuit's opinion will become a dangerous precedent for second guessing district court judges and speculating what the effect of withheld evidence and prosecutorial misconduct may have on a criminal prosecution. Any appeal by a defendant who has suffered a serious *Brady* violation becomes limited, as the Second Circuit says, to appellate courts searching the record for the additional evidence in an effort to sustain the verdict of the jury — without ever considering what impact the *Brady* violation might have had on the jury's ultimate assessment of the evidence. Such an appeal is virtually guaranteed to fail unless the ruling of the Second Circuit is corrected by this Court.

Whether Petitioners' convictions for murder should rest on the Second Circuit's speculative assumptions that a reasonable or rational jury could find or could easily conclude that Petitioners committed the offenses based upon the most tenuous circumstantial evidence, is contrary to the principles of *Brady*. These conclusions were arrived at by the Second Circuit without considering what a jury would have found in the face of the startling evidence concerning the Scarpa murders and his placing the blame on others — which

rocked the Eastern District of New York to its very foundations. Such assumptions should not be a substitute for facts from which an appellate court can determine whether confidence in the verdict is undermined based upon withholding of such overpowering evidence of government misconduct.

The Second Circuit's abdication of the *Brady* rule, and undertaking the task of second guessing the district court and concluding that there was sufficient evidence to sustain the conviction despite such a serious *Brady* violation, marks a serious departure from the allocation of the fact finding process between district courts and appellate tribunals. Moreover, an examination of the record in this case will show that the Second Circuit's conclusion that the evidence submitted to the jury was "more than sufficient to sustain the convictions" involved pure conjecture. In any event, what a jury might have or might not have done is not the test and it is not for an appellate court to override a district court judge who has the advantage of viewing the evidence and witnesses. This sets a most dangerous precedent.

In relying on this erroneous test, the Second Circuit usurped the jury's function (much less Chief Judge Sifton's ability) to assess the trial evidence. *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996) (rejecting sufficiency of the evidence test because this would "require appellate courts to usurp the function of the jury, for judges would be forced to *guess*, based on a cold record, how the jury might have weighed the remaining evidence") (italics in original). While the Second Circuit may conduct an "independent examination of the record" to determine whether the suppressed evidence is material, it is equally clear that the District Court is in the best position to make factual findings which, accordingly, are entitled to great deference, *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997), subject only to reversal for abuse of discretion where the district court has committed plain error. *See United States v. Burns*, 104 F.3d 529, 537 (2d Cir. 1997).

In this case, where such compelling constitutional claims of prosecutorial misconduct have been asserted, this Court is not obliged to credit the determinations of the Second Circuit and is empowered to reach findings different from those of the court below — just as it did in *Kyles*. A fair reading of the Second Circuit opinion reveals that the entire *Brady-Kyles* application in this case rests on the inferences the jury could have drawn. Thus, virtually all the constitutional aspects of the *Brady* rule, as applied in this case, rest solely on an appellate court's assessment of any additional evidence apparent only in the minds of the Second Circuit. But when other juries heard of the "Scarpa disclosures," they acquitted the defendants. Put another way, courts have emphasized that the evaluation of a *Brady* claim should not be made with "20/20 hindsight." The Court must visualize what could have been done with the information — if it had been made available at the time of the trial.

The strict adherence to the *Brady* rule that discourages prosecutors from suppressing evidence favorable to a defendant is necessary in order to build a sense of confidence in our judicial system. If our courts are to continue to play a role in influencing the course of individual rights in criminal proceedings then a rigorous and unflagging allegiance to *Brady* is desperately needed and must be preserved above all others. It needs constant nourishing and reinforcement. To give legal sanction to what was done here to these Petitioners, without accepting the grave consequences that threaten the integrity of our criminal justice system and the *Brady* rule, would be unthinkable.

Thus are drawn the opposing views as to whether harmless error can be found in the face of such a serious *Brady* violation as is presented by this Petition. The Government will doubtless try to add additional arguments supporting the Second Circuit's analysis. All of which will make for a full debate in this Court as to what constitutes harmless error under *Brady*. As a consequence, the decision of the Second Circuit should be reviewed.

Conclusion

For all the foregoing reasons, this petition for certiorari should be granted.

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November 1998

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

UNITED STATES COURT
OF APPEALS
FILED AUG 26 1998
CAROLYN CLARK
CAMPBELL, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of August one thousand nine hundred and ninety-eight.

USA,

v.

Orena.

Dkt No: 97-1174(L)
97-1175
97-1176

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the defendant-appellees.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued March 6, 1998.

Decided June 3, 1998.

Docket Nos. 97–1174 to 97–1176.

UNITED STATES of America,

Appellant,

v.

Victor J. ORENA; Pasquale Amato; Carmine Sessa; Michael Sessa; Lawrence A. Fiorenza; Lawrence Mazza; Robert Zambardi; Alphonse Persico; Joseph Tomasello; Theodore Persico, Sr.; Richard Fusco; James Delmastro,

Defendants,

Joseph P. Russo; Anthony Russo; and Joseph Monteleone, Sr.,

Defendants-Appellees.

Valerie Caproni, Assistant United States Attorney for the Eastern District of New York, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Barbara D. Underwood, Chief Assistant United States Attorney, of counsel), for Appellant United States of America.

Salvatore J. Marinello, Mineola, NY, for Appellee Joseph P. Russo.

Alan S. Futerfas, New York City (Ellen B. Resnick, of counsel), for Appellee Anthony Russo.

Joshua L. Dratel, New York City (Marion A. Seltzer, of counsel), for Appellee Joseph Monteleone, Sr.

Before: OAKES and CABRANES, Circuit Judges, and HURLEY, District Judge.*

JOSE A. CABRANES, Circuit Judge:

The government appeals from that portion of a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, Chief Judge) granting a new trial to defendants-appellees Joseph P. Russo, Anthony Russo, and Joseph Monteleone, Sr. *See United States v. Persico*, No. CR-92-0351, 1997 WL 867788 (E.D.N.Y. March 13, 1997). The district court granted appellees' motions for a new trial on the basis that the government violated its *Brady* obligations, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose information that defendants could have used to impeach the credibility of out-of-court statements made by co-conspirator Gregory Scarpa, Sr., that were admitted at trial under Fed.R.Evid. 801(d)(2)(E).[1] While granting appellees' motions for a new trial, the district court denied their motions to dismiss the indictment altogether based on allegations of "outrageous government conduct." We affirm so much of the district court's order as denied appellees' motions to dismiss the indictment, but reverse so much of the order as granted appellees' motions for a new trial because we conclude that the impeachment evidence withheld by the government does not meet the *Brady* standard of "materiality."

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* The Honorable Denis R. Hurley, of the United States District Court for the Eastern District of New York, sitting by designation.

[1] Rule 801(d)(2)(E) provides that "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is "not hearsay."

I.

This case arises from the deadly internal war within the Colombo Organized Crime Family of La Cosa Nostra (the "Colombo Family") that began in 1991 when the Colombo Family split into two opposing factions — one loyal to the incarcerated "official" boss of the family, Carmine Persico, Jr., and the other loyal to the appointed acting boss, Victor J. Orena. *See Persico*, 1997 WL 867788, at *2. The complex details of this intra-family war are described at greater length in the district court's opinion, with which we assume familiarity.

On May 13, 1993, a fifteen-count superseding indictment was returned against defendants-appellees — Joseph P. Russo, Anthony Russo, and Joseph Monteleone, Sr. — and co-defendants Alphonse Persico, Joseph Tomasello, Theodore Persico, Sr., Richard Fusco, Robert Zambardi, Lawrence Fiorenza, Lawrence Mazza, and James Delmastro. All three defendants-appellees were charged with violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d). Defendants-appellees, members of the Persico faction, were charged — both as predicate RICO offenses and as separate substantive offenses — with conspiracy to murder members of the Orena faction and with the murders of two particular members of the rival faction, John Minerva and Michael Imbergamo. Joseph and Anthony Russo were also charged — both as independent offenses and as part of the RICO pattern of racketeering — with conspiracy to make extortionate extensions and collections of credit, in violation of 18 U.S.C. §§ 892, 894. Finally, all defendants-appellees were charged with the substantive offense of using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). After a ten-week jury trial, Joseph Russo and Monteleone were found guilty of all charges, and Anthony Russo was found guilty of all charges except for the charge of conspiracy to make

extortionate collections of credit. *See Persico*, 1997 WL 867788, at *1.

The Trial Evidence

The government's evidence at trial came primarily in the form of testimony from four accomplice witnesses — Lawrence Mazza, Carmine Sessa, Joseph Ambrosino (all members of the Persico faction), and Salvatore Micciota (a member of the Orena faction) — and revealed the following:

Joseph and Anthony Russo were captains in the Colombo Family, and in 1992, after the intra-family war commenced, Joseph Russo was named acting underboss within the Persico faction; Monteleone was a member of the Russos' crew. *See id.*, 1997 WL 867788 at *3, *5. After an unsuccessful attempt by Persico loyalists to kill Victor Orena in June 1991 inflamed tensions within the Colombo Family, Sessa attended a meeting that included the Russos, Monteleone, and others, during which the Russos told Sessa that they would call in their men and tell them to prepare for war with the Orena faction. Miciotta, at the time a member of the Russos' crew, testified that he was called to a meeting by the Russos at which the Russos told him and other members of the crew about the intra-family war, and to ready themselves for it. Following the meeting, Monteleone told Miciotta "that this was an opportunity for all of us to elevate our stature in the family." *Id.*, 1997 WL 867788 at *2, *5.

A truce organized by representatives of the other organized crime families of La Cosa Nostra broke down in November 1991 when members of the Orena faction attempted to kill Gregory Scarpa, Sr., a soldier in the Persico faction. Mazza testified that immediately after the attempted murder of Scarpa he went with Scarpa to see Anthony Russo, and after being informed of the attempt on Scarpa's life, Anthony Russo said that he would contact Sessa, Joseph Russo and others to let them know that "the shooting started." *Id.*, 1997 WL 867788 at *2. A meeting was then

held at Joseph Russo's grandmother's house in Brooklyn, at which the Persico captains decided to retaliate. Ambrosino testified that Anthony Russo assured him that they were ready to attack the Orena side. He also testified that, sometime after this meeting, Joseph Russo and Theodore Persico told him [Ambrosino] that they, Anthony Russo, and others had attempted to kill Benny Aloi, an Orena captain, but had "just missed." *Id.* According to Mazza and Sessa, Monteleone participated in a murder attempt on a different member of the Orena faction, Louis Malpeso, which was also unsuccessful. *See id.*, 1997 WL 867788 at *5.

During the early months of 1992, the Russos attended several meetings of Persico faction members to monitor the progress of the war. Sessa and Scarpa repeatedly complained that Scarpa and his crew were the only ones who had actually succeeded in killing any Orena faction members, and that they were unfairly shouldering the burden for all the others. The Russos provided assurances that their associates "were out every day looking for people," particularly those former members of the Russos' crew who had switched allegiances to the Orena side, including John Minerva. *See id.*, 1997 WL 867788 at *3.

On March 25, 1992, John Minerva was killed outside a cafe he owned on Long Island. *See id.* Michael Imbergamo, who apparently had been providing security for Minerva following an earlier attempt on Minerva's life two weeks prior to his murder, was killed along with Minerva. Eyewitness testimony and telephone records placed Monteleone, in an agitated state, *see* Trial Transcript at 3542, at a bar and a delicatessen less than two blocks away from Minerva's cafe shortly before Minerva's murder. *See* 1997 WL 867788, at *5.

Soon after the Minerva/Imbergamo murders, the Russos and other members of the Persico faction, including Scarpa, met at Wolf's Delicatessen in Manhattan. Mazza testified that during this meeting, the Russos admitted their involvement in these murders, bragging that "they had been working on

getting [Minerva]" and "finally got to him in front of his cafe," and that they were particularly satisfied because Minerva had worked for Joseph Russo's father for many years before deciding to ally himself with Orena. *See id.*, 1997 WL 867788 at *4.

Unlike Mazza, Sessa testified that he first learned of the Russos' involvement in the murders not from the Russos themselves but from Scarpa. Soon after the murders, and after learning from Scarpa about the Russos' involvement, Sessa attended a meeting of Persico faction members (including Monteleone) at a New York diner. When he entered the meeting Sessa approached Joseph Russo and congratulated him for his "nice work," and Russo accepted the congratulations. Although Minerva's name was not mentioned, Sessa testified that he believed the reason for the congratulations — the killing of Minerva — was well understood by Russo. Sessa thereafter heard from another member of the Persico faction of the Colombo Family — either Joseph Tomasello or Theodore Persico — that Monteleone and another member of the Russos' crew, Tommy Gioeli, as well as a member of Theodore Persico's crew, had committed the Minerva/Imbergamo murders. Sessa, in turn, told Ambrosino that the Russos' crew was responsible for the murders. *See id.*, 1997 WL 867788 at *3.

The case presented by defendants-appellees consisted largely of efforts to discredit the accomplice witnesses, and to portray the cycle of violence that erupted in 1991 as purely a personal vendetta on the part of Scarpa, perpetrated with the aid of Sessa. Defendants-appellees claimed that there was no factional war within the Colombo Family, but merely a "Scarpa/Sessa war." They argued that the attempted murder of Scarpa could be explained by the fact that Scarpa was widely believed to be a government informant, and that, in turn, Scarpa had purely personal motives for murdering his victims — to prevent them from revealing that he was an informant and to retaliate against them for the attempt on Scarpa's life. More generally, defendants-appellees tried to portray Scarpa as "a loose cannon," and "argued to the jury

that Scarpa was not a person to be trusted and was in fact an informant." *Id.*, 1997 WL 867788 at *9. Additionally, the Russos pointed to "the lack of hard evidence to link them to the Minerva and Imbergamo homicides," and challenged Mazza's testimony about the Russos' statements at the Wolf's Delicatessen meeting as uncorroborated and unreliable. *Id.* Monteleone, whose initial line of defense appeared to be that he could not be placed near the murder scene at the relevant time, *see* Trial Transcript at 3527-31, 3537-38, 5288, 5319-20, argued in summation that although he was in fact present near the scene shortly before the murders, he had actually been secretly visiting Minerva, with whom he had remained friends despite the war. *See* 1997 WL 867788, at *10.

The Withheld Information

Shortly after trial, in response to a discovery request by defense attorneys in a different case, prosecutors for the first time disclosed that Scarpa was in fact a government informant, and had been so since at least 1980. Documents disclosed by the government (principally, internal FBI memoranda called "209s") revealed that Scarpa had provided substantial information to the government during his time as an informant, including information regarding the Orena/Persico war. Most significantly for purposes of this appeal, the 209s also revealed that, in discussions with the FBI, Scarpa had lied about or misrepresented his own involvement in several murders, which he either attributed to the "Persico faction" — without identifying himself as the member of the faction responsible for the murders — or falsely attributed to someone else.[2] *See id.*, 1997 WL 867788 at *10-11, *33.

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[2] Although the district court does not explain exactly how it is known that these murders were "indisputably committed" by Scarpa, 1997 WL 867788, at *33, the government does not challenge this assertion.

Prosecutors also disclosed information — although, according to the district court, it was "produced more slowly," *id.*, 1997 WL 867788 at *12 — regarding a potentially improper relationship that had developed between Scarpa and his FBI contact, Special Agent R. Lindley DeVecchio. It was ultimately revealed that, during Scarpa's years as an informant, DeVecchio may have given Scarpa highly sensitive information that would have helped Scarpa to wage war against the Orena faction and avoid arrest for his own criminal activities, as well as to avert the arrest of his associates and his son for their criminal acts. Suspicions within the FBI regarding this relationship had been strong enough, prior to the commencement of the trial in this case, to trigger an internal investigation. *See id.*, 1997 WL 867788 at *12-13. Prosecutors were aware both of Scarpa's informant status and of this internal FBI investigation prior to the beginning of the defendants-appellees' trial. *See id.*, 1997 WL 867788 at *13. In affidavits requested by the district court at the initial argument of the motions that are the subject of this appeal, the prosecutors stated that they had not disclosed Scarpa's informant status or the investigation into alleged improprieties by DeVecchio because they believed that this information was not material under *Brady*. *See id.*, 1997 WL 867788 at *13, *16. Prosecutors had also failed to turn over an FBI report — a so-called "302 report" — in which Mazza revealed his awareness that Scarpa had a law enforcement source whom Scarpa referred to as "the girlfriend" (the "Girlfriend 302"), despite the fact that the court had ordered the production of all Mazza 302s at the outset of trial. *See id.*, 1997 WL 867788 at *15. The Assistant United States Attorney responsible for the production of the Mazza 302s asserted in her affidavit that she was not aware of the "Girlfriend 302" because it was not turned over to her by the FBI agent from whom she had requested the Mazza 302s. *See id.*, 1997 WL 867788 at *16. The agent responsible for turning over these documents, in turn, attested that before doing so she consulted with her supervisor, who told her to put aside the two 302s relating to Scarpa's law-enforcement source (including the "Girlfriend

302"), which the supervisor believed should not be distributed outside of the FBI until the FBI had completed its internal investigation. *See id.*

The District Court's Opinion

In response to these disclosures, the Russos and Monteleone, as well as co-defendants Theodore Persico, Sr. and Lawrence Fiorenza, filed post-trial motions for a new trial, *see* Fed.R.Crim.P. 33, and for dismissal of the indictment, *see* Fed.R.Crim.P. 29. Apart from arguing that the "outrageous government conduct" in this case warranted outright dismissal of the indictment, appellees and their co-defendants argued that a new trial was required because the withheld evidence about Scarpa could have been useful to the defense in a number of ways. The district court characterized the proposed theories regarding the usefulness of the Scarpa evidence as follows:

> 1) that it tends to cast doubt on the reliability of the government's investigation of their case; 2) that the testimony of Mazza and Sessa could have been impeached with the new information about their relationship with Scarpa; 3) that Scarpa's hearsay statements could be impeached; 4) that the war in which defendants allegedly participated was in reality a "Scarpa/Sessa" war in which these two pursued their own agenda; 5) that Scarpa himself was pursuing his own agenda, creating the appearance of a factional war for his own purposes; and 6) that the government was the primary proponent of the war.

Id., 1997 WL 867788 at *28.

The district court denied the motions to dismiss the indictment, and denied the new-trial motions of co-defendants Theodore Persico, Sr. and Lawrence Fiorenza, but granted appellees' motions for a new trial on all counts except for the loansharking convictions. *Id.*, 1997 WL 867788 at *1, *37. The court rejected all of appellees'

theories as to why the Scarpa evidence required a new trial, with the exception of one — namely, that certain statements made by Scarpa to his FBI handler could have been used to impeach his out-of-court statements admitted at trial.[3] In particular, the court was concerned with "the Scarpa 209s in which Scarpa blames other members of the Persico faction for murders he indisputably committed." *Id.*, 1997 WL 867788 at *33. Although these 209s did not, in the court's view, require a new trial for Theodore Persico, Sr. and Lawrence Fiorenza, the court reached a different conclusion with respect to the Russos and Monteleone:

> The potential impact of these 209s on the jury's findings with respect to the Russos' and Monteleone's involvement in the murders resides in the government's reliance on co-conspirator statements explicitly attributed to Scarpa or which might have been traced to Scarpa as its principal evidence of the Russos' involvement in these murders. Sessa was told of the Russos' culpability by Scarpa; he in turn told Ambrosino. The jury was informed of both of these Scarpa statements. Co-conspirator statements of other nonparticipants, Joseph Tomasello and Theodore Persico, also attributed the murders to the Russos and [Monteleone], but the source of that information was not explored and was arguably Scarpa.

Id., 1997 WL 867788 at *34. Although the court recognized that "[a] substantial amount of evidence" of guilt existed independently of Scarpa's out-of-court statements, *id.*, the court believed that sufficient doubt was cast upon the jury's

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[3] Notably, in moving for a new trial appellees had given relatively little attention to this argument. Instead, they had relied primarily on the arguments that Scarpa's role as an informant precluded the admission of his out-of-court statements under the co-conspirator hearsay exception, and that the withheld evidence could have been used to show that there was no Orena/Persico war, but merely a personal war waged by Scarpa, with the help of Sessa and the FBI.

verdict to require a new trial because "the fact that Scarpa lied to the FBI about some of his murderous activities gives rise to the inference that he lied about this one as well." *Id.*, 1997 WL 867788 at *35.

Having held that a new trial was required on the charges that appellees murdered Minerva and Imbergamo, the court believed it was compelled to grant a new trial as well on the charge of conspiracy to murder members of the Orena faction. While "[t]he independent and untainted evidence clearly demonstrates that the Russos were present at meetings having to do with the war and that Joseph Russo was appointed acting underboss of the family by Carmine Persico as the factions entrenched" — not to mention the clear evidence "link[ing] both Russos to plans to kill other Orena faction members" — the court concluded that "[w]ith doubt cast on [appellees'] involvement in the Minerva and Imbergamo homicides . . . none of their other statements or acts makes a finding of guilt of conspiracy inescapable." *Id.*, 1997 WL 867788 at *35.

The government now appeals.

II.

The government's *Brady* obligation to disclose material evidence favorable to a criminal defendant applies not only to exculpatory evidence, but also to evidence that could be used to impeach government witnesses.[4] *See, e.g., United States v.*

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[4] "It is well settled that evidence is not considered to have been suppressed within the meaning of the *Brady* doctrine if the defendant or his attorney either knew, or should have known of the essential facts permitting him to take advantage of that evidence." *United States v. Torres*, 129 F.3d 710, 717 (2d Cir.1997) (internal punctuation and citation omitted). Although appellees suspected that Scarpa was an informant, and argued as much to the jury, this was merely a suspicion, and in any event appellees lacked evidence of the specific information exchanged between Scarpa and the FBI that has now become available. Accordingly, the government does not rely on the argument that *Brady*

(Footnote Continued on Following Page)

Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Wong*, 78 F.3d 73, 79 (2d Cir.1996). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (internal quotation marks and citations omitted). In other words, evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. 1555; *see United States v. Payne*, 63 F.3d 1200, 1209 (2d Cir.1995). This materiality inquiry is a mixed question of law and fact, and "[w]hile the trial judge's factual conclusions as to the effect of nondisclosure are ordinarily entitled to great weight, we conduct our own independent examination of the record in determining whether the suppressed evidence is material." *Payne*, 63 F.3d at 1209 (internal quotation marks and citations omitted); accord *United States v. Zagari*, 111 F.3d 307, 320 (2d Cir.1997).

Although *Kyles* made clear that the test of materiality is whether the withheld evidence reasonably undermines confidence in the verdict — not whether sufficient independent evidence exists to support a conviction, *see* 514 U.S. at 434-35, 115 S.Ct. 1555 — the existence of substantial independent evidence of guilt is unavoidably relevant to whether withheld impeachment evidence can reasonably call the jury's verdict into question. *See United States v. Avellino*, 136 F.3d 249, 257 (2d Cir.1998) ("In general, evidence whose function is impeachment may be considered to be material where the witness in question supplied the only evidence linking the defendant to the crime. Similarly, impeaching matter may be found material where the witness supplied the only evidence of an essential element of the offense.") (citations omitted), *reh'g denied*, 1998 WL 195636

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was not violated because appellees were already sufficiently aware of Scarpa's informant status.

(2d Cir. Apr.23, 1998) (*per curiam*); *Payne*, 63 F.3d at 1210 ("[A] new trial is generally not required when the testimony of the witness [as to whom impeachment evidence has been withheld] is 'corroborated by other testimony.' ") (quoting *United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir.1987)). Where substantial evidence of guilt entirely unrelated to the withheld impeachment evidence exists, it will be more difficult to argue that there is a reasonable probability that the withheld evidence, if disclosed, would have resulted in a different verdict. *See, e.g., Zagari*, 111 F.3d at 321 (concluding that impeachment evidence regarding government witness was immaterial where testimony was corroborated by independent evidence); *Payne*, 63 F.3d at 1210-11 (same).

In the instant case, as the district court recognized, "[a] substantial amount of evidence independent of Scarpa's co-conspirator statements remains to link the Russos and Monteleone to these murders." 1997 WL 867788, at *34. The most compelling evidence of the Russos' guilt — which, indeed, is difficult to reconcile with the district court's characterization of Scarpa's coconspirator statements as the government's "principal" evidence, *see id.*, 1997 WL 867788 at *34 — was Mazza's testimony about the meeting at Wolf's Delicatessen, at which the Russos proudly boasted that they had succeeded in killing Minerva. This testimony by Mazza was entirely independent of Scarpa's coconspirator statements. Additionally, Sessa testified that Joseph Russo accepted congratulations for the Minerva/Imbergamo murders, and even if Sessa first learned of appellees' responsibility from Scarpa, Joseph Russo's acceptance of credit constitutes independent evidence of guilt. Moreover, the evidence showed that the Russos had an even greater motive to kill Minerva than to kill other members of the Orena faction, in light of his defection to the Orena side after having worked for Joseph Russo's father for many years; indeed, the testimony of Mazza showed that the Russos had proclaimed their intent to specifically target defectors such as Minerva, *see id.*, 1997 WL 867788 at *3. With respect to

Monteleone, compelling direct evidence, including telephone records and eyewitness testimony, placed him near the scene of the murders shortly before they took place.[5]

While we recognize, again, that the test for materiality "is not a sufficiency of evidence test," *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555, the strength of the independent evidence of appellees' guilt increases the degree of significance that would need to be ascribed to the withheld impeachment evidence in order for it reasonably to undermine confidence in the verdict. Our conclusion that the district court erred in granting a new trial is ultimately based on the fact that the court gave undue weight to the impeachment evidence itself. Defendants already had in their possession absolutely devastating evidence with which to assail Scarpa's credibility; among the many crimes Scarpa had committed were numerous murders and attempted murders, not to mention his unrealized plans to murder Ambrosino's mother and his own daughter-in-law. Indeed, throughout Joseph Russo's summation counsel attacked Scarpa's credibility, casting him as the lone uncontrollable villain who was perpetrating a personal campaign of violence that the

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[5] The evidence that appellees, particularly the Russos, participated in the conspiracy to murder members of the Orena faction — as opposed to having succeeded in murdering Minerva and Imbergamo — was overwhelming. While noting that the "independent and untainted evidence" clearly placed the Russos at meetings during which the factional war was discussed, and connected them to plans to kill other Orena faction members, the district court nonetheless believed that it was compelled to grant a new trial on the conspiracy charge because "[w]ith doubt cast on their involvement in the Minerva and Imbergamo homicides . . . none of [appellees'] other statements or acts makes a finding of guilt of conspiracy inescapable." 1997 WL 867788, at *35. Contrary to the district court, we believe that at least the Russos (if not Monteleone) were "inescapabl[y]" guilty of conspiracy to murder members of the Orena faction irrespective of any evidence regarding the Minerva/Imbergamo murders. Inasmuch as we also reverse the district court's grant of a new trial on the murder charges, however, we have no need to separately address this issue.

government had mistaken for a factional war within the Colombo Family. *See* Trial Transcript at 5810, 5981-86, 6007-10, 6015. It is well settled that where ample ammunition exists to attack a witness's credibility, evidence that would provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial. *See, e.g., Avellino*, 136 F.3d at 257-59; *Zagari*, 111 F.3d at 320-21; *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir.1996); *United States v. Gambino*, 59 F.3d 353, 366-67 (2d Cir.1995), *cert. denied*, 517 U.S. 1187, 116 S.Ct. 1671, 134 L.Ed.2d 776 (1996); *United States v. Orena*, 32 F.3d 704, 717 (2d Cir.1994); *United States v. Locascio*, 6 F.3d 924, 949-50 (2d Cir.1993), *cert. denied*, 511 U.S. 1070, 114 S.Ct. 1645, 1646, 128 L.Ed.2d 365 (1994); *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir.1975), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976). Accordingly, in light of Scarpa's long and depraved criminal history, his misrepresentations to the FBI about his own involvement in certain murders was merely cumulative evidence of his lack of credibility, or his "deviousness," 1997 WL 867788, at *35 ("Based on the Scarpa 209s discussed above, I find that there is a reasonable probability of a different outcome in this case had the jury been aware of Scarpa's deviousness as revealed in the 209s.").

However, it seems clear that the district court did not rely on the Scarpa 209s merely as evidence that Scarpa was not generally credible and that any statements attributed to him should be viewed with skepticism, but as evidence that he was in the particular habit of blaming others for murders he had committed. In other words, in the view of the district court, Scarpa's lies to the FBI about murders actually committed by him give rise to a direct inference that he may have lied to his co-conspirators about the Minerva/Imbergamo murders, and that he may have committed those murders himself. *See id.* ("[T]he fact that Scarpa lied to the FBI about some of his murderous activities gives rise to the inference that he lied about this one as well."). Contrary to the district court, we believe that only the

weakest of inferences can be drawn from the 209s to support the argument that Scarpa lied to his co-conspirators and actually committed the Minerva/Imbergamo murders himself. Particularly in light of the substantial independent evidence of appellees' guilt, this inference is simply too weak to warrant a new trial.[6]

The fact that Scarpa, in conversations with the FBI, failed to indicate his own involvement in certain murders or accused others of murders he committed, provides scant support for the inference that, in conversations with his own co-conspirators, he falsely attributed the murders of Minerva and Imbergamo to appellees, even though he actually committed them himself. It would have been perfectly sensible for Scarpa to tell the FBI that others had committed murders actually carried out by him and his crew — namely, to minimize the risk that he would lose FBI protection by admitting his involvement in these homicides. At the same time, among his co-conspirators, murdering Minerva and Imbergamo would have been a badge of honor, and Scarpa would have had good reason to take credit for the murders if

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[6] The fact that Scarpa lied to the FBI about his own involvement in other murders does not, in and of itself, constitute affirmative evidence that he (and not appellees) murdered Minerva and Imbergamo. Indeed, significantly, appellees introduced no evidence whatsoever that Scarpa murdered Minerva and Imbergamo, despite the fact that — had appellees been innocent of these murders — they would have had every reason to suspect Scarpa. We note this not because we are placing any affirmative burden on defendants to disprove the government's case, but merely because the district court's conclusion that the Scarpa 209s could have supported a reasonable inference that Scarpa lied to his co-conspirators and that Scarpa, rather than appellees, murdered Minerva and Imbergamo, would have been strengthened if there had been any independent evidence connecting Scarpa to these murders. Our conclusion that the Scarpa 209s do not support a reasonable probability of a different verdict does not ultimately rest on the lack of any evidence in this record that Scarpa murdered Minerva and Imbergamo, but on the fact that Scarpa's lies to the FBI are only minimally probative of whether he lied to his co-conspirators. *See infra.*

indeed he had committed them. Cf. *United States v. Friedman*, 854 F.2d 535, 570 (2d Cir.1988) ("Specific issues of whether a declarant's past conduct may actually cast doubt on the credibility of his statements must be determined by comparing the circumstances of the past conduct with those surrounding the hearsay statements admitted into evidence.") (internal punctuation and citation omitted).

We do not suggest that there are no plausible reasons why Scarpa might have falsely told his co-conspirators that the Russos and their crew committed the Minerva/Imbergamo murders even if he committed them himself. For example, Scarpa might have been worried that other members of the Persico faction of the Colombo Family were, like Scarpa himself, government informants, and that word of his responsibility for the murders would get back to the FBI. However, nothing prevented appellees from raising any such arguments as to why Scarpa might have had a motive to lie to his co-conspirators about the Minerva/Imbergamo murders. The point is simply that such arguments would have gained little direct support from the evidence that Scarpa lied about other murders to the FBI. Notwithstanding Scarpa's close relationship with the FBI, the two contexts are entirely different, and only an exceedingly weak inference — too weak to create a "reasonable probability" of a different verdict — can be drawn connecting Scarpa's misrepresentations in one context to his alleged misrepresentations in the other.

III.

Appellees Joseph and Anthony Russo argue that, even if the district court erred in finding the withheld evidence to be material, we should nonetheless affirm the order granting a new trial or we should direct the dismissal of the indictment altogether in light of "outrageous government conduct." The district court gave careful consideration to the serious charges of misconduct in this case, and substantially for the reasons stated by the district court, *see* 1997 WL 867788, at *18-24,

we do not believe that either dismissal of the indictment or a new trial is warranted. With respect to the FBI's failure to turn over the "Girlfriend 302" to prosecutors, thereby depriving the prosecutors of the ability to fulfill their *Brady* obligations, we join the district court in emphasizing that while the FBI may have had compelling reasons to believe that this document should not be disclosed, under such circumstances "it is necessary for the government to take the Court into its confidence, through sealed and ex parte application, so that the need for disclosure can be adjudicated prior to trial." *Id.*, 1997 WL 867788 at *23. Nonetheless, we also agree with the district court that neither the failure to disclose the Girlfriend 302 nor any of the other actions by the government requires dismissal of the indictment; nor do we believe that they require a new trial.

IV.

In sum, evidence that Scarpa lied to the FBI about murders he committed provides little direct support for the conclusion that he also lied to his own co-conspirators about who was responsible for the murders of Minerva and Imbergamo. To the extent that this evidence could have been used in a broader fashion to attack Scarpa's credibility — rather than to support a direct inference that, because he lied to the FBI, he also lied to his co-conspirators — the devastating impeachment evidence already available to defendants rendered this new evidence cumulative. Finally, the fact that substantial evidence of guilt existed that was entirely unrelated to the credibility of Scarpa's co-conspirator statements makes it all the more clear that the withheld impeachment evidence does not support a "reasonable probability" of a different verdict.

We have considered all of appellees' arguments, and find them to be without merit. The judgment of the district court is affirmed insofar as it denied appellees' motions to dismiss the indictment, reversed insofar as it granted appellees' motions for a new trial, and remanded to the district court with instructions to enter a judgment in accordance with the verdict of the jury finding Joseph Russo and Joseph Monteleone, Sr. guilty of all charges and Anthony Russo guilty of all charges other than the charge of conspiracy to make extortionate collections of credit, and for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES of America

v.

Theodore Persico, Jr., *et alia*,

Defendants.

No. CR-92-0351 (CPS).

March 13, 1997.

AMENDED MEMORANDUM AND ORDER

SIFTON, Chief Judge.

On April 20, 1994, defendants Joseph and Anthony Russo, Theodore Persico Sr., Joseph Monteleone, Sr., and Lawrence Fiorenza were convicted on violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d), and other charges. The indictment in this case arose primarily out of an internal war within the Colombo organized crime family.[1]

Several post-trial motions have been filed by the defendants jointly and individually pursuant to Fed.R.Crim.P. 29 and 33. The bulk of the motions center on the role of Gregory Scarpa, Sr., who at the trial of this matter

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[1] For other aspects of the war, *see United States v. Orena*, 32 F.3d 704 (2d Cir.1994).

was alleged by the government to be a co-conspirator and participant in many of the crimes alleged. However, as discussed below, it subsequently came to light over the course of subsequent trials involving other members of the Colombo family that Scarpa was also a long-time informant for the government. It was further revealed that Scarpa was receiving information relating to the ongoing criminal investigation of these defendants, which was of potential use to him in pursuing the war. He received this information from the FBI agent overseeing Scarpa's activities as an informant, Special Agent R. Lindley De Vecchio. The defendants seek, inter alia, a new trial based on the government's failure to disclose this information during their trial or dismissal of the indictment for outrageous government conduct.

For the reasons set forth below, defendants Anthony Russo, Joseph Russo, and Joseph Monteleone are granted a new trial because of the government's failure to disclose material evidence bearing on the credibility of certain co-conspirator statements made by Scarpa that were used by the prosecution to establish these defendants' responsibility for the murder of Joseph Minerva and Michael Imbergamo. All other motions are denied.

BACKGROUND

After a ten-week trial, a jury found each defendant named above guilty of counts one and two of the indictment against them alleging RICO and RICO conspiracy, respectively. Joseph Russo was found to have committed racketeering acts three and four, which accused him of the murders of Joseph Minerva and Michael Imbergamo; act seven, which accused him of a generalized conspiracy to murder members of the Orena faction; and acts eight-A and eight-B, which charged respectively separate conspiracies to make and to collect extortionate extensions of credit of which he was acquitted. Joseph Russo was also found guilty of counts five, six, and nine, which accused him of the above murders and murder conspiracy; counts ten and eleven, which respectively

charged conspiracies to make and collect extortionate extensions of credit; and count twelve, which charged a firearms violation in connection with the murders and conspiracy to murder alleged in the indictment. Anthony "Chuckie" Russo was convicted of each of the same charges and racketeering acts, with the exception of racketeering act eight-A and count eleven, which charged conspiracy to make extortionate collections of credit. Defendant Theodore Persico was found to have committed Racketeering Acts seven, eight-A, and eight-B, and was found guilty of count nine, ten, eleven, and twelve. Defendant Joseph Monteleone was found to have committed racketeering acts three, four, and seven. He was also found guilty of counts five, six, nine, and twelve, all relating to the Minerva and Imbergamo murders. Defendant Lawrence Fiorenza was found to have committed racketeering act five, which accused him of the murder of Lorenzo Lampesi, and acts seven and eight-B. He was further found guilty of count seven, which charged the Lampesi murder; count thirteen, which charged a firearms violation; and counts nine, eleven, and twelve.

Evidence Presented at Trial

Most of the testimony at trial came from four members of the Colombo family and participants in the war for control: Carmine Sessa, so-called consigliere of the Colombo family; Salvatore Miciotta, a one-time soldier in Joseph Russo's crew; Joseph Ambrosino, an associate in Michael Sessa's crew; and Lawrence Mazza, an associate in Greg Scarpa's crew.

The evidence presented showed that by the end of 1991, the Colombo family had split into two warring factions, one loyal to the acting family boss Victor Orena and the other loyal to Carmine Persico, Jr., the incarcerated "official" boss of the family. At trial, the government demonstrated, primarily through the testimony of Carmine Sessa, that Victor Orena was appointed acting boss during the time of Persico's incarceration and that in the spring of 1991 Orena

determined that Persico should be replaced as boss on the ground that Persico had admitted to the existence of and his membership in the Colombo family of the La Cosa Nostra ("LCN") on the television program Sixty Minutes. Sessa described how tensions mounted between those loyal to Orena and those loyal to Persico. Sessa testified that he had participated in an attempt to kill Victor Orena in June of 1991 but that no shots were fired at that time. Actual shooting between the factions started with a November 1991 attempt on Greg Scarpa's life. According to Sessa, Scarpa identified Orena faction members as participants in the attempt.

Joseph and Anthony Russo

The government presented evidence from a variety of sources to describe Joseph Russo's involvement in the Colombo family and his participation in the war. Sessa testified that Anthony and Joseph Russo met with Sessa and others shortly after the June 1991 attempt on Victor Orena's life and stated that they would inform their men that the intra-family war had broken out. Miciotta, then a soldier in Joseph Russo's crew, testified that he was called to a meeting by Joseph and Anthony Russo and Theodore Persico, at which he was told about the war and instructed to prepare for it. Miciotta stated that Joseph Russo had a gun in his waistband during this meeting.[2] Miciotta overheard Anthony Russo give "the same spiel" to other mobsters, Jimmy Gooch and Paul DeMaio. In August of 1991, according to his testimony, Sessa, the Russos, Theodore Persico and others met at the Persico farm in Saugerties, New York. There Theodore Persico relayed Carmine Persico's support for the war efforts.

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[2] After this meeting, Miciotta and John Minerva decided that at the very least, they would remain uninvolved with the war. Some days previous to the meeting, they had attended an Orena faction wedding at which the Russos and others did not attend. Miciotta and Minerva decided that they had been sent by the Russos as sacrificial lambs to see if any shooting might break out. They were later approached by the Orena faction and changed their allegiance.

Larry Mazza testified that, when Anthony Russo learned of a November 1991 attempt by the Orena faction to kill Greg Scarpa, Anthony appeared agitated and stated that he would let Sessa, Joseph Russo and others know that "the shooting started." Sessa testified that, shortly after Scarpa was shot at in November 1991, a meeting was held at Joseph Russo's grandmother's house. Ambrosino and Fiorenza also attended. At this meeting, Sessa testified, Scarpa described the attempt against him, and those present determined that retaliation was necessary. Sessa testified that guns and ammunition were retrieved from a suitcase. At the end of this meeting, according to Ambrosino, "I turned around to Chuckie Russo and asked him if we were ready to attack the other side, and he said yes." (1075). Sometime after this meeting, Joseph Russo and Theodore Persico told Ambrosino that they, Chuckie Russo and others had attempted to kill an Orena captain, Benny Aloi, but had "just missed" him.

Mazza also testified to a meeting in Manhattan that took place in January 1992. At this meeting, Sessa expressed his concern that only Scarpa's crew was actively pursuing the war, but Joseph Russo responded that "his men were all out working hard." Joseph Russo stated that "he was looking for particularly Joe Bodanza, Sally Majork, Johnny Minerva, Lenny Dello, a few guys aligned with [Russo] before the war." When Mazza, a member of Scarpa's crew, told the others that Scarpa had decided that he would go after Bodanza himself, Theodore Persico and Joseph and Anthony Russo informed Mazza that they were getting close to finding and killing him. Joseph Russo gave Mazza an address for Sally Majork so that the Russos and Scarpa crews could work together. According to Mazza, Scarpa later obtained another address for Majork, saying that it came from an Orena source.

Ambrosino testified about a meeting at a Steak & Ale in New Jersey at which Sessa expressed his concern that the captains were not doing enough in the war, to which the Russos replied that the associates in their crews "were out every day looking for people."

According to Sessa, in February 1992 at a meeting at a Red Lobster restaurant in New Jersey, Scarpa complained that he was "the only one being shot at, or doing any shooting." According to Sessa, Joseph and Anthony Russo and Theodore Persico protested that they were just unlucky and had not spotted anybody yet.

Later in the spring of 1992, according to Sessa, the Russos, Scarpa, Sessa and others attended a meeting at the Sheraton Meadowlands. Sessa testified that at this meeting Joseph Russo was appointed acting underboss. Mazza testified that, although he was not a direct participant in this meeting, he saw the Russos and Theodore Persico enter the Sheraton. After the meeting, Mazza testified, Scarpa informed him that Joe Tomasello had been appointed acting boss and that Joseph had been appointed acting underboss. Mazza testified that during this time he and Scarpa were reporting to Anthony Russo.

In March 1992, John Minerva and Michael Imbergamo were killed outside Minerva's cafe on Long Island. There was no participant testimony identifying the person or persons who shot the two men. Photographs showing the two bullet-ridden bodies were received in evidence. Miciotta testified that Minerva had been associated with the Russos prior to the war but, as described above by Sessa, had abandoned the Persico faction in June 1991 along with Miciotta. Sessa testified that Minerva owed Joseph Russo money from loansharking operations at the time of his death.

Sessa testified that he first heard that Minerva had been killed from Greg Scarpa. Sessa informed Scarpa that he was disappointed that Minerva, a soldier, had been targeted rather than crew captains. Scarpa told him not to express his disappointment to Joseph Russo. At a meeting at another New York diner shortly after the murder at which the Russos, Persico, Monteleone, Scarpa, Sessa and others were present, Sessa approached Joseph Russo, saying "Congratulations, JoJo. Nice work." Joseph Russo thanked Sessa for the congratulations. Sessa testified that, although Minerva's

name was never mentioned, based on his observations of Joseph's demeanor he believed that Joseph Russo understood that the congratulations were for killing Minerva. Sessa testified that he later learned from another member of the Colombo family — either Joe Tomasello or Theodore Persico — that "Joseph Monte, Frankie Sparoco, and Tommy Gioeli killed Johnny Minerva." The source of Tomasello or Theodore Persico's information was not explained at trial. Defendant Joseph Monteleone (Joe Monte) and Gioeli were soldiers in the Russos' crew. Sessa also informed Ambrosino presumably based on what Scarpa told him that "the crew downtown" — meaning the Russos' crew in downtown Brooklyn — was responsible for the murder of Minerva and exhorted Ambrosino to "answer the bell."

Shortly after these murders, Theodore Persico, Joseph and Anthony Russo, Scarpa, Sessa, Mazza and others met at Wolf's Delicatessen in Manhattan. Mazza's testimony concerning this meeting follows:

> Q Would you describe what, if anything, was said at that time? And, again, try as best as you can to identify who was participating in the conversation at those various points.
>
> A Started out with the usual, you know, small talk, how is everybody doing, asked about Greg's health. And we went into — the murder that had just taken place. Johnny Minerva. "JoJo" Russo was doing most of the talking. He was telling Greg that Johnny Minerva — excuse my language — was a scum bag for what he had done. And "Chuck[ie]" said that they had been working on getting him. They finally got to him in front of his cafe, they killed him. Said that they knew there was somebody else also killed, didn't care who it was.
>
> "JoJo" was satisfied because he was with his father Andrew Russo for many years . . . and Johnny Minerva switched his allegiance to Vic Orena, Vic

Orena. That is what made it satisfying. Teddy Persico was just ecstatic and sitting there very proud.

Q Would you describe "JoJo" Russo's demeanor during the time he was making these statements?

A Satisfied, was very satisfied.

Q What about "Chuck[ie]" Russo?

A The same thing, he was happy, very happy that they were able to tell Greg they were participating and actually did something.

Q Did something . . . Now, what, if anything, did Greg Scarpa, Sr. say in response to the statements that you just described?

A He was very happy. He congratulated them and told them it was a good piece of work.

Tr. at 3783-84.

In April 1992, at a meeting attended by approximately ninety members of the rival factions, the Orena side proposed that, since Orena had been arrested, a vote should be held as to who the boss should be. The Persico faction, and Joseph Russo in particular, took the position that Carmine Persico should remain the boss and refused to agree to stop the shooting while the sides negotiated. Miciotta, an Orena faction member, attended this meeting and testified to what transpired; neither Scarpa nor Sessa attended.

Sessa also testified that in 1992 Joseph Russo told him that he had participated in an attempt to kill Miciotta and that, if he had a "long-scoped" rifle available, he would have been able to get him. Sessa spoke with Joey Legrano ("Joe Legs") and arranged to get the rifle; he later learned from Joe Legs that he had given it to defendant Monteleone. Sessa testified that in June of 1992, after a failed attempt to kill William Cutolo, he met with the Russos, Scarpa, Joe Tomasello and others at a Holiday Inn off the New York

State Thruway to discuss a second attempt. The Russos asked Sessa if he needed help with the attempt, but Sessa declined the assistance. The attempt was never carried out because Joseph Ambrosino was arrested that day. Sessa also testified to seeing the Russos and Joseph Monteleone with guns on various occasions during the course of the war.

With respect to the loansharking charges, Miciotta testified that he had been receiving loansharking money from his captain Andrew Russo, Joseph Russo's father, and was repaying Andrew at approximately two points of interest per week. Miciotta would pay on Friday, along with other members of the crew who had similar loansharking debts. He testified that, after Joseph Russo became captain when his father went to jail, Joseph Russo received Miciotta's payments of $100 per week on an outstanding loan of $30,000. Miciotta testified that Joseph was also receiving payments on a loan to John Minerva. Sessa testified that, long before the war started, he had contacted Joseph Russo on behalf of one of Russo's debtors to ask if Russo would give him a break; Russo refused. Evidence was also received that both Russos, as crew captains, received a $15,000 share of Jimmy Angellino's loanshark book after Angellino had been killed.

Joseph Monteleone

Sessa testified that Joseph Monteleone, known as Joe Monte, was a member of Joseph Russo's crew, although he served as Theodore Persico's bodyguard while acting as his chauffeur. In June 1991, after the attempt On Scarpa's life, Miciotta testified that Monteleone and Tommy Gioeli picked up Miciotta to take him to a meeting with the Russos and Teddy Persico. Miciotta observed that Monteleone was carrying a gun. On the way home from this meeting, Monteleone was reported to have said to Miciotta that "this was an opportunity for all of us to elevate our stature in the family. If we were successful in this war we would all wind up captains." Miciotta also testified that Monteleone was a

member of Joseph Russo's crew. Later during the course of the war, Monteleone urged Miciotta to switch back to the Persico side. According to Sessa, Monteleone was involved in an attempt on the life of Louis "BoBo" Malpeso and that, while making passes in front of Malpeso's club, shots were fired at Monteleone and his companion Gioeli, who was wounded in his hand. Mazza also testified that Monteleone told him that Gioeli and Monteleone were spotted and shot at while "doing surveillance" on Malpeso's place, waiting for Malpeso to come out so that they could shoot him.

In March of 1992, Joseph Minerva and Michael Imbergamo were murdered outside Minerva's club. Sessa testified that he heard from either Theodore Persico or "Joe T" that the murders were committed by Monteleone, Gioeli, and Frankie Sparaco. The source of this information was not explored at the trial.

The government produced evidence from non-accomplices that Monteleone was present near Minerva's cafe at the time of the murders. A clerk at a nearby delicatessen remembered Monteleone asking for a telephone; telephone records from Blanche's bar next door to the delicatessen show calls from the bar to Monteleone's girlfriend's house and to his son's beeper. Monteleone, on the other hand, offered evidence that he remained on a friendly basis with Minerva despite the war, from which it was argued that, if he met with the murder victim that night, it was as a friend.

* * *

Scarpa's Involvement in the War

Throughout the trial, government prosecutors depicted Scarpa as a co-conspirator and participant in the war on the Persico side. The evidence produced at trial attributed several significant acts of violence to Scarpa. Mazza testified that he, Scarpa and others killed Gaetano Amato and injured Joseph Tolino in a December 3, 1991 attempt to kill "Funzi"

D'Ambrosio. On December 6, 1991, according to Mazza, Scarpa killed Vincent Fusaro and on January 7, 1992, killed Nicky "Black" Grancio. As noted above, Scarpa was one of the shooters in the Lampesi murder. Mazza also testified that he participated with Scarpa in attempts to kill Patty Amato and Salvatore Miciotta in January and February 1992. Testimony was also presented linking Scarpa to pre-war murders and to numerous murderous schemes in the course of the war in addition to those referred to above.

In addition to these acts of violence, the testimony of the government witnesses established that Scarpa was a significant instigator of violence by others. Scarpa frequently expressed a concern that the other members of the Persico faction were not doing enough for the war effort. At the Steak & Ale meeting, Sessa and Scarpa urged the faction to stick together, arguing that that was the only way to win the war. Mazza testified that in January 1992 Scarpa attempted to kill Joseph Baudanza in order to "set an example" for the Russos and Theodore Persico, who had been stating their intention to kill this individual but had not done so. In February 1992, at a meeting at a Red Lobster restaurant, Scarpa urged the faction members to step up their efforts, as he believed he was the only individual taking action or facing reprisal.

Co-conspirator Statements by Scarpa

As Scarpa was a key participant in the war, several witnesses testified to statements made by him in their presence in furtherance of the conspiracy. A summary of the most significant of these statements follows.

Sessa testified about Scarpa's statements to him about loansharking. He also recounted the shooting attempt on Scarpa and his family by the Orena faction, as told to him by Scarpa. However, the fact that the shooting occurred is not seriously disputed. Sessa also testified that Scarpa told him of the accidental killing of Tommy "Scar" when Scarpa was trying to kill "Funzi" and that Vincent Fusaro was killed by

Scarpa. Scarpa told Sessa that he was interested in using a bazooka on Joe Scopo, that he had attempted to kill Joel "Joe Waverly" Cacace, and that he was thinking of shooting an Orena faction member at a wake. As detailed above, Sessa first learned of Minerva's murder from Scarpa; Sessa later congratulated Joseph Russo for the murder [3] [4] and passed this information on to Ambrosino, informing him that the "crew downtown" committed these murders. Sessa testified that Scarpa had told him he was looking to kill Larry Lampesi and that Scarpa had described that murder to him. Sessa testified about plans to murder several individuals and how Scarpa assisted or directed those plans.

Mazza's testimony began by identifying numerous members of the Colombo family. Mazza was a member of Scarpa's crew and acknowledged that his information in this regard came from Scarpa. Scarpa told Mazza about the tensions leading up to the war, including Orena's disrespect for Carmine Persico. Scarpa told Mazza that Orena referred to the Persico faction as "rebels." [5] Mazza testified to other meetings that Scarpa told him about, including a meeting at Mt. Sinai Hospital and the meeting at the Sheraton Meadowlands, where Joseph Russo was appointed acting underboss. This statement was corroborated by Sessa's testimony. Mazza testified about a meeting at the Frontier Diner, which Scarpa described to him, in which Scarpa proposed calling mock peace talks and using the opportunity to kill Orena faction members; Scarpa described the Persicos and the Russos as in favor of this plan. Mazza told of Scarpa's plans to kill other individuals, including Cutolo, Michael Bowcock and Ambrosino's mother.

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[3] * * *

[4] Anthony Russo asserts that "Sessa was told by Scarpa that Tommy Gioeli, Frank Sparaco, and Joseph Monteleone were "somehow" involved in the murder of John Minerva." Sessa's testimony does not, however, explicitly describe Scarpa as the source of this information.

[5] This statement was specifically admitted only for the fact of its occurrence, not for its truth.

Ambrosino provided some testimony about the murder attempt on Scarpa which he, like Sessa, learned from Scarpa. He told of Scarpa's experiences in prior wars as he had heard them from Scarpa. Ambrosino learned from Scarpa that Fiorenza overslept on the morning of the Lampesi murder. He also testified to what Scarpa told him of other murder efforts in which Scarpa was involved.

Defenses at Trial

Although unaware of Scarpa's position as an FBI informant, the defense attacked Scarpa at trial, using both the allegations in the New York Post that Scarpa was an informant and his violent criminal past. They elicited testimony and argued to the jury that Scarpa was not a person to be trusted and was in fact an informant. The defense brought out that Sessa at one point was so convinced that Scarpa was an informant that Sessa dug up and moved a body he had killed and buried with Scarpa's knowledge, because he was worried Scarpa might reveal it to law enforcement. Sessa further testified that Lampesi had authored a letter alleging that Scarpa was an informant and that it was likely that one of Scarpa's motives in killing Lampesi was in retaliation for this letter. From Miciotta, it was learned that Orena had contracted to kill Scarpa in part because he believed Scarpa was an informant and that, in turn, Scarpa may have attempted to kill Joe "Waverly" because Waverly had long believed that Scarpa was an informant. From these events, counsel argued that the "war" was really a personal vendetta perpetrated by Scarpa with the aid of Sessa. Joseph Russo's counsel argued that "everybody mistrusted Scarpa because they believed he was an informant." Anthony Russo argued that Scarpa was a loose cannon, bypassing his captain and reporting directly to Sessa about shootings and murders.

Theodore Persico's defense focused on attacking the credibility of the witnesses based on their criminal history and motivations to lie. Theodore Persico's lawyer argued that the evidence did not show him to have had an active role in

the conspiracies and that he was merely a bystander. He also argued that, even if the evidence showed Persico's participation in extending loans with an excessive interest rate, evidence of threats or violence attached to those loans was absent.

Joseph and Anthony Russo also attacked the credibility of the witnesses and the lack of hard evidence to link them to the Minerva and Imbergamo homicides. They too argued that Sessa's testimony evidenced a "Scarpa/Sessa" war, spurred by both men's personal motives. They argued that the theory of a Persico/Orena faction was an after-the-fact rationalization of what occurred. They attacked Mazza's Wolf's Deli statements as uncorroborated and suspect. Joseph Russo argued that it made little sense for him to kill Minerva, since the deceased owed him money. Anthony Russo endeavored to explain his attendance at meetings as "lip service" to Sessa and Scarpa without substance. He asked the jury to infer that Scarpa and Sessa were the perpetrators of all the killings.

In his closing argument to the jury, Joseph Monteleone argued that he was present near the scene of the crime because he was there to visit his friend with whom he remained close despite the war. Testimony by John Mancinelli, the owner of Eduardo's Restaurant, that Minerva and Monteleone were long-time, good friends and that Monteleone ate dinner with Minerva at Eduardo's at approximately the time of Minerva's death was relied on to bolster this argument. Monteleone argued that no physical evidence linked him to the murders and that no evidence demonstrated his agreement or participation in any other murder conspiracies.

Lawrence Fiorenza argued that he was coerced into joining Sessa and Ambrosino in their dispute with Orena. He argued that, because of Sessa and Scarpa's reputation for violence, Fiorenza had to pretend to be part of the conspiracies, though he endeavored to avoid active participation. As evidence that he lacked murderous intent throughout the conspiracy, he pointed to his failure to show

up for the Lampesi murder. He also argued that the Lampesi murder was the product of Scarpa's personal vendetta against Lampesi based on Lampesi's belief that Scarpa was an informant.

Subsequent Disclosures

Subsequent to trial the prosecution disclosed that, during the course of the war and indeed for a considerable period of time before that, Scarpa had been an informant for the FBI. In addition, the prosecution disclosed that shortly prior to the trial of this matter an investigation of Scarpa's FBI contact, Lindley De Vecchio, had commenced based on allegations of improprieties in his dealings with Scarpa, including revealing information concerning government investigations of Scarpa and his son and addresses of Orena faction members.

In order to judge the significance of these post-trial disclosures in context, a summary of what is now publicly known follows.[6] The information provided reveals that Scarpa was an informant for the FBI since at least 1980. These revelations, contained principally in internal FBI memoranda called "209s," reveal that Scarpa provided extensive information concerning the Persico/Orena war. This information included the following:

- June 21, 1983: That Charlie "Champagne" was killed in the belief that he had something to do with Little Allie Boy Persico's arrest on narcotics charges, and that the Colombo family believed Persico to have been framed by the FBI.

- October 25, 1984: That Carmine Persico and others had learned of pending FBI arrests and met to

[6] This summary is limited to the material publicly known as a result of these proceedings and not submitted *ex parte*. Material provided *ex parte* is summarized in a portion of this opinion which is filed herewith under seal. Some material originally provided *ex parte* may now be public as a result of disclosures in other proceedings.

discuss who would be available to be arrested and that Little Allie Boy Persico and Chuckie Russo were being used to conduct family business in Persico's absence.

- May 3, 1988: That Carmine Sessa was the acting capo instead of Theodore Persico since Carmine Persico did not want Theodore exposed because Theodore was the only mob member of the Persico family not in jail; that Joseph Russo had taken over as capo for his father; and that Chuckie Russo was acting capo for Anthony Scarpati's crew, in which Scarpa, Sr. was a soldier.

- May 10, 1989: That Jimmy Angellino had been killed because he was told to step down as consigliere and had refused and that the orders to kill him came from Carmine Persico via Theodore Persico.

- June 13, 1989: That Carmine Sessa was closely allied to Victor Orena and was rising in power due to that association, and that a murder had recently been committed by Sessa's crew.

- June 12, 1990: That certain Colombo members, including Bill Cutolo, were thought by Carmine Persico to be gaining too much influence in the family.

- July 8, 1991: That Carmine Sessa, Bobby Zambardi, and others had plotted to kill acting boss Victor Orena, but that this was called off when Orena spotted the crew outside his residence, and that this attempt split the family into two factions.

- August 13, 1991: That Victor Orena was attempting to assume full control of the Colombo family and had demoted Teddy Persico, JoJo Russo, Chuckie Russo, and others because of their allegiance to Carmine Persico.

- November 4, 1991: That if shooting broke out between the factions, Joey Scopo and Billy Cutolo might be Persico faction targets while Sessa and Scarpa might be targeted by the Orena side; that John Gotti had been manipulating Orena with a view toward taking over the Colombo family's activities; that Chuckie Russo was staying close to his club, surrounded by his crew; and that Russo was not a strong captain but relied heavily on Greg Scarpa, Sr., for advice and muscle.

- November 18, 1991: That an attempt to kill Scarpa had been made by members of the Orena faction.

- November 25, 1991: That Hank Smurra had been killed and that the Persico faction would be likely to retaliate soon.

- December 11, 1991: That Gaetano Amato (a Genovese member) and Vincent Fusaro had been shot by the "Persico faction" [in fact, by Scarpa himself]; that other hits were committed; and that law enforcement pressure might slow down the shooting, but it would pick up again unless some of the leaders were killed or indicted. [7]

- December 30, 1991: That the arrest of Victor Orena might temporarily halt the shooting war.

- January 14, 1992: That the killing of Nicky Grancio was committed by Richie Fusco's crew, in part because Grancio had tried to have Fusco killed several months ago. [In fact, Scarpa appears to have killed Grancio.]

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[7] This 209 from which this information is drawn was produced following the "kitchen meeting" between Scarpa and De Vecchio discussed below.

- February 2, 1992: That there was a recent attempt to kill Joseph Baudanza by members of JoJo Russo's crew.

- February 25, 1992: That Carmine Persico put out a contract on "Frankie the Bug" Sciortino through his brother Theodore Persico.

- March 6, 1992: That a meeting took place attended by Theodore Persico, Carmine Sessa, JoJo Russo, Chuckie Russo, Scarpa, and Fusco, where a discussion was held regarding a truce offer.

- March 31, 1992: That the murders of John Minerva and Michael Imbergamo were handled by the Russos' crew.

- April 14, 1992: That Carmine Persico instructed his faction to keep hitting Orena faction members in order to force them to switch sides.

Although the government disclosed that Scarpa served as an informant shortly after the trial of these defendants, disclosures relating to possible improprieties by law enforcement were produced more slowly. In preparation for the Orena trial before Judge Korman in 1995, the government made public a letter describing the activities of FBI contact De Vecchio. This letter reads in part:

> [T]he following constitutes our knowledge of the items that Special Agent R. De Vecchio may have disclosed to Gregory Scarpa, Sr., and the approximate time of the disclosure:
>
> A. the planned 1987 arrest by the DEA of Greg Scarpa, Jr. and his crew, and that law enforcement believed that Cosmo Catanzano was a "weak link," who might cooperate with authorities if arrested;
>
> B. on or about February 27, 1992, that Carmine Imbriale was cooperating with law enforcement;

C. during the Colombo family war, information on at least one member of the Orena faction who had a hit team that was looking for members of the Persico faction;

D. following the arrest of Joseph Ambrosino, that there were arrest warrants pending for Lawrence Mazza and James DelMasto (two of Scarpa's closest associates), but that if they stayed away from their normal "hangouts," they could avoid being arrested;

E. in or around January 1992, that it was believed [incorrectly] that Orena was staying at his girlfriend's house, the location of which (as then known by some in law enforcement) was also conveyed;

F. in or around January 1992, the address of the house in which Salvatore Miciotta was residing; and

G. in early 1992, subscriber information for telephone numbers of two of Scarpa's loanshark customers;

H. in the mid to late 1980's, that Scarpa's social club was subject to court-ordered electronic surveillance and that he would soon be arrested on charges involving dealing with fraudulent credit cards.

Letter dated May 8, 1995, from Ellen M. Corcella, A.U.S.A., to Defense Counsel in the Orena Case in Pretrial Proceedings Before Judge Korman.

From the testimony of Special Agent Christopher Favo of the FBI, in the course of the trial of *United States v. Orena* before Judge Korman, it became obvious that the FBI had warnings in advance of the trial before the undersigned that De Vecchio had become involved with Scarpa to a wholly unacceptable degree. According to Agent Favo, when in May 1992 Favo reported the Lampesi murders to De Vecchio, De Vecchio became "excited."

I had gotten the information about the two shootings in the morning. They both occurred before 9:00. It

> was approximately 9:00 when I went in to see Mr. De Vecchio. I walked in, I said my usual briefing, two shootings occurred, two Orena side people were shot, they're not really sure who did it and so forth.
>
> As I started into that he slapped his hand on the desk and he said, "We're going to win this thing," and he seemed excited about it. He didn't know we were the FBI or that he was not on our side.
>
> A line — it was like a line had been blurred.
>
> (Orena at 5209.)

He further testified that at that point, he determined that "I was not going to say anything to him that I thought would prevent us from arresting Greg Scarpa." From that point on, over the course of the investigation, he lied to De Vecchio about information coming into his possession that implicated Scarpa. (Orena at 5210.)

From the testimony of Special Agents Favo, Tomlinson, and Leadbetter during the Orena trial, and from the affidavit of Tomlinson produced in April 1994 but released during that trial, it was disclosed that Agent Tomlinson first learned in February 1992 from Carmine Imbriale that Greg Scarpa had murdered someone while serving as an informant. This information as to Scarpa's responsibility for this killing was confirmed by Joseph Ambrosino following his arrest in June 1992. Tomlinson testified that he informed De Vecchio of this fact. FBI regulations required Special Agents to report such information to their superiors. Tomlinson testified that he believed that De Vecchio would make the required report. (Orena at 3327.) Shortly thereafter, Tomlinson began to grow suspicious of De Vecchio's relationship with Scarpa, and, accordingly, the Brooklyn District Attorney's office was assigned the role of investigating Scarpa in order to keep the details from De Vecchio. (Orena at 3338.) Tomlinson was aware that the Brooklyn DA's office was seeking Scarpa on weapons charges from an incident on March 31, 1992. In

June of 1992, Tomlinson testified before a grand jury with respect to Scarpa's crimes. (Orena at 3297.)[8]

The debriefing of Carmine Sessa appears to have been central to Favo and Tomlinson's realization of the depth of De Vecchio's misconduct. Sessa was arrested on April 4, 1993; Special Agent Tomlinson was in charge of his debriefing, although De Vecchio sometimes attended. According to Tomlinson's affidavit, in the course of the debriefings, Sessa referred to his suspicions that Scarpa had a law enforcement source. Over the latter half of 1993, more arrests were made and several individuals decided to cooperate. New information developed as a result led Tomlinson to interview Sessa again. At that time Sessa apparently put together Scarpa's references over the years to a Mr. Dell or Dello with De Vecchio's interest in his debriefing and concluded that De Vecchio was Scarpa's source. Shortly thereafter, Tomlinson and Favo brought the issue to Assistant Special Agent in Charge ("ASAC") Don North of the FBI. Tomlinson testified that this decision was made at least in part because of the trial of this case in February 1994: "We wanted to make certain that [the cooperating witnesses] would be credible and if they were asked on the stand about Scarpa, Sr.'s law enforcement source we wanted them to be answering honestly so we decided to discuss our concerns with ASAC Donald North. We thought it was important in view of the possibility that one of the CWs might state in court their belief that SSA

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[8] Harold Leadbetter, an FBI agent who worked on the Colombo investigation, corroborated this testimony. He began working on the Colombo investigation in March of 1992 and learned that Scarpa was an informant in November of 1992. He believed that the squad obtained sufficient evidence to arrest Greg Scarpa in the summer of 1992. Leadbetter testified that in the course of debriefing various Colombo members, in particular Carmine Sessa, William Meli, Mario Parlagreco and Larry Mazza, Leadbetter became aware of their belief that Scarpa had a law enforcement source. He was also aware of Favo's encounter with De Vecchio where the latter expressed joy at the deaths of Orena faction members.

De Vecchio was a source for Scarpa, Sr." Tomlinson Aff. 4/6/94. North informed the agents that an inquiry would be conducted. Thereafter during the trial of this matter and in greater depth at its conclusion, the FBI pursued this inquiry with the AUSAs involved in the trial of this case attending at least some of these interviews. AUSA Stamboulidis attests that he became aware of the allegations of De Vecchio's misconduct in January or February 1994, before the commencement of the trial here. He states that he learned of this information from AUSA Caproni, who served as a contact person with OPR. He attests that he did not disclose this information because, like Scarpa's informant status, he did not consider it material.

Information relevant to the propriety of the government prosecutors' handling of the information about Scarpa and De Vecchio was also slow in emerging. In preparation for trial of *United States v. Cutolo*, CV-93-1230, before Judge Nickerson, it was disclosed that both Larry Mazza and Carmine Sessa had revealed to prosecutors that they knew or believed during the war that Scarpa had a source of information within law enforcement. This information was contained in 302 reports prepared prior to, during, and subsequent to the trial of these defendants before the undersigned. According to the Mazza 302 dated March 9, 1994,

> Scarpa Sr. told Mazza that he received information from a source in law enforcement, and a source from the Orena faction. One of the sources that supplied information of a regular basis was referred to as "The Girlfriend." The source would call him at home, as well as beep him. . . .
>
> On one occasion, Mazza was in Scarpa Sr.'s house when he received a telephone call from "the girlfriend" on the basement telephone. After the call, he told Mazza that the "Girlfriend" said that the members of the Orena faction were very close to killing him. . . . Scarpa Sr. received another call from

> this source while he was on bail. During this call, "The Girlfriend" told Scarpa Sr. that if there were no more shootings, Mazza and Delmasto might not be in too much trouble with the Law. "The Girlfriend" also told Scarpa Sr. that his bail was close to being revoked.
>
> The "Girlfriend" said that he was concerned about Scarpa Sr., and that he should be careful. Scarpa Sr. was noticeably concerned after these telephone calls, and always trusted the information he received from this source. [9]

In preparation for the Orena trial before Judge Korman, further 302s were released relating to Carmine Sessa's knowledge of Scarpa's relationship with law enforcement. According to these documents, prepared before and during the trial of these defendants before the undersigned and presumably seen by the prosecutors in this case, Sessa stated that he believed that during the 1980's Scarpa had some type of law enforcement source. Sessa gave as the basis for his belief the fact that Scarpa was able to obtain telephone numbers, license plate checks, and addresses. After Ambrosino's arrest, when Sessa expressed his fears to Scarpa about Ambrosino's cooperation, Scarpa advised him not to worry. According to a 302, Sessa believed that, if he stayed close to Scarpa, he could avoid arrest. Sessa stated that in the 1960's there were stories that Scarpa had been cooperating with law enforcement and that fellow Colombo family member Joe Tomasello told Scarpa that the answer to these charges was to go out and kill someone, because the government would never allow its informants to commit such crimes. Ironically, Sessa related that his suspicions that Scarpa was providing information were repeatedly allayed by his knowledge that Scarpa was routinely involved in murder

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[9] This 302 has been dubbed "The Girlfriend 302" by the parties and is so referred to hereafter in this opinion.

and acts of violence, which Sessa assumed would not be allowed an informant.

In addition, the 302s reveal Sessa's reports that Scarpa never seemed to have any fear of law enforcement, harassing FBI agents when they attempted to handcuff him in the course of an arrest, for example, and that Scarpa also seemed to tolerate the presence of bugs in "the Whimpy Boys' Club, his social club. Sessa was recorded as believing that he was the beneficiary of some of Scarpa's contacts with the FBI. In 1988, when Sessa and others were arrested for a bank robbery, Sessa believed that the light sentence he received was the result of Scarpa's contacts.

The 302s available to prosecutors in this case reveal that Sessa stated that, while he had never seen Scarpa receive information from a law enforcement source, Scarpa was able to notify his son about a DEA drug investigation a month before the charges were brought and, on occasion, seemed to possess information that Sessa believed could only come from wiretapped conversations. The 302s reveal Sessa's recalling a number of occasions when Scarpa received suspicious visits and phone calls.

The first public acknowledgement by prosecutors that Scarpa was an informant occurred shortly prior to the trial of Alphonse Persico in this Court. Subsequently, in preparation for the trial of *United States v. Cutolo*, FBI 302 reports concerning Lawrence Mazza were produced that document his knowledge of Scarpa's "girlfriend" as a source of information. This 302 had not been produced at the trial of this matter despite this Court's direction during the course of trial that the government produce pursuant to 18 U.S.C. § 3500 all 302 reports recording statements of Mazza relating to the subject matter of his direct testimony. More public disclosures came during the Orena trial before Judge Korman. In those proceedings, the two Sessa 302s discussed above were produced, and the government publicly revealed that disclosures by De Vecchio to Scarpa were being investigated.

At the initial argument on these motions, the Court requested affidavits from the prosecutors. The government has produced these as well as affidavits of FBI agents Maryann Goldman and Christopher Favo. These affidavits reveal the following.

According to AUSA Stamboulidis, he learned of Scarpa's informant status in March of 1992. He was not told what information Scarpa had provided, nor was he shown any FBI 209 reports created during the course of Scarpa's informant career. Subsequent to Scarpa's 1992 arrest, AUSAs Weissmann and Stamboulidis and Special Agent Favo, among others, met. At that time, Weissmann was informed that Scarpa was an informant. It was also made clear that Scarpa had committed crimes while an informant in violation of FBI policy. Thereafter, Stamboulidis and Weissmann prosecuted Victor Orena, Sr., in a separate trial, *United States v. Amato*, and AUSAs Caproni and Considine prosecuted *United States v. Brady* both involving charges arising out of the war. No information about Scarpa's informant status was disclosed during these trials. During the course of those trials, although various cooperating witnesses testified to their belief that Scarpa was an informant, defense counsel never requested confirmation of that information, and the information was never confirmed. Also during this period, Scarpa was arrested, indicted, and pled guilty. Weissmann attests that, in the course of plea negotiations with Scarpa, Scarpa never argued that he was authorized by the FBI to commit his crimes.

AUSA Corcella, who also participated in the trial of the defendants herein, learned of Scarpa's status when she was assigned to the trial of this case before the undersigned in the summer of 1993. At that time, she attests that she asked AUSA Weissmann whether Scarpa's informant status was subject to *Brady* disclosure. According to her, Weissmann responded that it was not *Brady* material because it did not go to the guilt or innocence of the defendants but instead to collateral issues. Corcella and Stamboulidis attest that it did not occur to them during the course of the prosecution that

Scarpa could be other than a co-conspirator and full-fledged participant in the war.

At the outset of the trial in this matter, this Court ordered the production of 302s recording Mazza's statements that had been prepared subsequent to Mazza's decision to cooperate with the government.[10] The "Girlfriend 302" discussed above was not disclosed pursuant to this directive, although it had been prepared. AUSA Corcella, responsible for the production of discoverable materials, attests that, at the time she provided the Mazza 302s, she was unaware of the existence of the one omitted. She attests that on or about February 26, 1994, she informed FBI Agent Goldman of this Court's order and asked her to provide all of the 302s so that they could be reviewed and the appropriate ones disclosed. According to the affidavit of Agent Goldman, by early March 1994 she had prepared all of Mazza's 302s, as his debriefing had been completed, and prepared to provide them to Corcella. Two of these 302s, including the "Girlfriend 302," dealt with information about Scarpa's law enforcement source. Before providing these materials to Corcella, Goldman consulted with her supervisor, Agent Favo, who instructed her to set those aside, as they should not be disseminated outside the FBI until after reviewed in conjunction with the FBI's internal investigation. Agent Favo attests that he instructed Goldman not to discuss Mazza's information with anyone but the FBI's Office of Professional Responsibility ("OPR"), which would investigate the matter, and also confirms that he instructed her not to provide the Girlfriend 302 and the other

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[10] This Court directed the FBI "to forthwith prepare their 302's with respect to statements of Mr. Mazza and Mr. Miciotta concerning statements they have relating to the subject matter of their direct testimony and to either make those statements available to defense counsel Friday morning or show cause why they shouldn't be made available."

302 to the prosecutors. AUSA Corcella attests that she became aware of this 302 after this trial.[11]

As detailed in the affidavit of AUSA Stamboulidis, the decision to disclose Scarpa's status came during preparations for the Alphonse Persico trial before the undersigned subsequent to a motion by Persico's attorneys to take a videotape deposition of Scarpa, who was then on his deathbed. The motion was argued on May 31, 1994, but Scarpa died before the deposition could be held. Alphonse Persico's attorneys had arranged for Scarpa to sign an affidavit revealing his informant status on the day before Scarpa died. Thereafter, AUSAs Caproni, Corcella, and Stamboulidis met to discuss a request by Persico's attorney to confirm Scarpa's status and to provide his informant file and the sealed minutes of his sentencing and decided to release relevant FBI 209s and the sentencing files.

The defendants call the Court's attention to two additional disclosures not addressed by the AUSA affidavits since they were made after those affidavits were requested. The first consists of the Sessa 302s, developed during the OPR investigation of De Vecchio and summarized above, that were disclosed at the outset of the Orena trial. The second consists of a 302 report produced by De Vecchio recounting a meeting with Scarpa on December 10, 1991, in his kitchen. This meeting occurred shortly after the attempt on Scarpa's life in November of that year. The 302 reports that De Vecchio, Tomlinson, and Special Agent Andjich met with Scarpa on that date in view of the recent attempt and gave him details of the witness protection program. It records a statement by Scarpa that the shooting was a case of mistaken identity and that he believed himself to be in no danger and had no knowledge of any Colombo family internal war.

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[11] AUSA Corcella attests that she disclosed it prior to the Alphonse Persico trial; defendants dispute this contention.

This 302 was produced before Judge Korman during jury deliberations in the Orena trial. The jury in that case sent out a note requesting it, although it had not been previously produced, and the government then made it available. It was given to the jury without explanation. When apprised of these facts, this Court ordered the defendants and the government to address the relevance of this disclosure to the this case. The defendants filed a response describing the possible defenses to which this document might relate. The government responded with a detailed explanation of how the document was created. The government's explanation was that the 302 was deliberately created to mislead because of the concern that there was a leak from the FBI concerning the investigation of the Colombo family. According to the government's memorandum, a 209 report summarizing the information actually received from this meeting with Scarpa was placed in a confidential informant's file under a different date. This document was as noted given to the Orena jury without explanation, although the government explained to the judge that Tomlinson and Andjich would testify that it was a fabrication, because the conversation described in the 302 did not take place.

***Ex Parte* Insert**

The following summarizes *ex parte* information provided by the government on this motion from (1) the informant files generated in the course of Scarpa's informant career and (2) affidavits from prosecutors and the investigative reports created during the inquiry into Agent De Vecchio's activities with Scarpa. This information is considered in determining whether Scarpa's relationship with the government requires dismissal of the indictment on the ground of outrageous government conduct and whether the defendants are entitled to a new trial because of non-disclosure. All *ex parte* information appears in a special font and is deleted from the version of this opinion contained in the public file. The version of the opinion containing the *ex parte* information is ordered sealed.

[REDACTED] DISCUSSION

The defendants make several legal arguments based on the information of which they are aware concerning Scarpa and De Vecchio and the government's failure to disclose that information prior to their trial. These arguments are discussed below.

* * *

Brady Obligations

Defendants' argue that the government violated its obligations under *Brady v. Maryland* by its failure to disclose information relating to Scarpa's status as an informant. It is well established that the government has an obligation to disclose material exculpatory information. *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). This obligation has been explicitly defined to include evidence that may be used to impeach a government witness. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97; *United States v. Bagley*, 473 U.S. 667 (1985); *see generally United States v. Gambino*, 835 F.Supp. 74, 85 (E.D.N.Y.1993), *aff'd*, 59 F.3d 353 (2d Cir.1995). Of course, it is equally well established that "the prosecutor has [no] constitutional duty routinely to deliver his entire file to defense counsel." *Agurs*, 427 U.S. at 111. As the Supreme Court has explained,

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no

> justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

Agurs, 427 U.S. at 111-113.

The Supreme Court further defined the standard of materiality in *Bagley*, holding that a conviction must be reversed "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." 473 U.S. at 678. Joined by Justice O'Connor, Justice Blackmun elaborated that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682; *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). Impeachment evidence is to be judged under the same standard as alleged "exculpatory" evidence, that is, with regard to whether it would have contributed to a reasonable probability of a different result. *Id; United States v. Underwood*, 932 F.2d 1049, 1052 (2d Cir.), *cert. denied*, 502 U.S. 942 (1991).

These principles have been strongly reaffirmed by the Supreme Court's recent decision in *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). As Justice Stevens acknowledged, *Kyles* did not "provide posterity with a newly minted rule of law" but instead constituted an in depth review of the facts of a particular capital case in light of the preexisting applicable law. *Id.* at 1576 (Stevens, J. concurring). Nevertheless, *Kyles* does provide a clear review of the Court's precedent and doctrine in this area.

The *Kyles* Court examined four aspects of materiality that are relevant to the instant case. The first involves the burden of proof. In no uncertain terms, the Court rejected the proposition that "a showing of materiality [requires] demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted

ultimately in the defendant's acquittal." *Id.* at 1566. Instead, *Bagley's* touchstone of materiality is a "reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. (citing *Bagley*, 473 U.S. at 678).

The Court then noted that *Bagley* does not involve a sufficiency of the evidence test. That enough evidence exists to convict in light of the disclosures is not the issue; rather, a *Brady* violation is shown when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* The Court next rejected the harmless error test applied by the court below, noting that the "reasonable probability" standard subsumes and surpasses the harmless error. In other words, one cannot violate *Brady* in a harmless fashion. *Id.* at 1566-67.

The final aspect of *Bagley* that the Court addressed is its requirement that suppressed evidence be considered collectively rather than individually. The prosecution, faced with a collection of individually immaterial pieces of evidence, is faced with the burden of considering whether, taken together, these items create a "reasonable probability" of affecting the outcome of the trial.

This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution's responsibility

for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 1567-68.

As the Supreme Court instructed in *Kyles*, this Court must consider the cumulative effect of the non-disclosures in this case. Whether each of the non-disclosures individually might have created a reasonable probability of a different verdict is not the question; the non-disclosures must be considered as a whole. Moreover, as *Kyles* further instructs, whether the information at issue was possessed by either the FBI or the prosecutorial team prior to or in the course of trial is immaterial.

Defendants argue that the evidence about Scarpa's involvement with the government provides several grounds for attack on the government's case. These theories include 1) that it tends to cast doubt on the reliability of the government's investigation of their case; 2) that the testimony of Mazza and Sessa could have been impeached with the new information about their relationship with Scarpa; 3) that Scarpa's hearsay statements could be impeached; 4) that the war in which defendants allegedly participated was in reality a "Scarpa/Sessa" war in which these two pursued their own agenda; 5) that Scarpa himself was pursuing his own agenda, creating the appearance of a factional war for his own purposes; and 6) that the government was the primary proponent of the war. While defendants phrase their generally applicable theories differently, they boil down to these six.

Brady and its progeny require materiality of non-disclosures to be viewed in light of the other evidence available. Non-disclosures may be considered both for their possible aid to the defense but also for their tendency to support the government's case, since the latter may mitigate any beneficial effect. *See United States v. Salerno*, 868 F.2d 524, 542 (2d Cir.), *cert. denied*, 491 U.S. 907 (1989). The question is not one of the sufficiency of the evidence remaining with or without the non-disclosures but the more

subjective inquiry of whether the non-disclosures would have had an effect on the jury. A simple application of *Kyles* is not possible here, however, because the indictment and the charges are substantially more complex than that addressed by the Supreme Court. Here, it makes the most sense to examine the elements of the charges against each defendant, consider how the undisclosed information might weaken those elements, and then conclude whether the disclosures were required. While the Court proceeds to consider individually the different theories advanced to weaken the prosecution's case, it is mindful that the non-disclosures — and the arguments deriving therefrom — must be considered with respect to their cumulative effect on the verdict.

At the outset, the Court rejects defendants' proffered theory that they could have persuaded the jury that, given the shocking nature of the disclosures, that the government was the primary proponent of the war or that Scarpa's intimate involvement with the government is by itself grounds for acquittal. The defendants have no greater right on post-trial motion than they do at trial to blunt the weight of the government's evidence by the visceral impact of emotional arguments or distraction of the jury from an examination of their conduct to that of the prosecution. *Cf. United States v. Corallo*, 413 F.2d 1306, 1321 (2d Cir.) ("As the conspirators run for cover a favorite diversionary tactic is to spread confusion by pursing digressions suggested by proof having only a tangential bearing on the case."), *cert. denied*, 396 U.S. 958 (1969). The fact that jurors might have reacted irrationally to the revelations does not undermine confidence in the verdict. The question whether non-disclosure of information relating to the government's involvement with Scarpa is material must turn on whether the information would have tended to negate or discredit the evidence relied upon by the government to meet its burden of proof to the extent that it undermines confidence in the jury's verdict. The Court thus proceeds to consider how that information related, if at all, to the elements of the crimes with which defendants were charged.

Counts one and two of the indictment charge all defendants with RICO violations. The relevant section of the criminal code, 18 U.S.C. § 1962(c), provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." Section (d) of the same statute makes it a separate crime to conspire to violate Section (c). Thus, in order to convict defendants of these counts, the government had to show the existence of the enterprise, that it affected foreign commerce, that a particular defendant was associated with that enterprise, that the defendant engaged in the pattern of racketeering activity alleged, and that the defendant conducted or participated in the conduct of the enterprise through that pattern or conspired to do so. *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir.1981), *cert. denied*, 457 U.S. 1136 (1982).

To the extent that defendants' arguments about Scarpa pursuing his own agenda or pursuing one in concert with Sessa are addressed to the government's proof of the enterprise, the defendants' membership in it, or to the existence of a pattern of racketeering through which the enterprise was being conducted during the war the arguments are without merit. Viewed in the context of the evidence at trial, the new information does not undermine confidence in the government's proof of these elements. The corroborated testimony of Ambrosino, Sessa, Mazza, and Miciotta demonstrating the existence of the factional war for control of the Colombo family is unassailable. Defendants have advanced no theory that undermines Ambrosino's and Miciotta's testimony. The evidence demonstrates that the factional war extended far beyond Scarpa and Sessa, and the facts that Scarpa was receiving information from the government, was serving as an informant, and that Sessa and Mazza believed they could gain some protection from associating with Scarpa does not detract from the proof that the Colombo family existed and that the factional war was a

means for its participants to obtain control. *See generally United States v. Orena*, 32 F.3d 704 (2d Cir.1994). Similarly, with respect to proof of the enterprise, membership, and the relationship of the murders and other racketeering acts to the enterprise, the effect that impeachment of Scarpa's hearsay statements would have had is minimal.[18]

Defendants' arguments that Sessa could have been impeached because of his awareness of Scarpa's position fail for another reason. Ample evidence was available to the defendants to support cross-examination of Sessa on his belief that Scarpa was protected by the FBI. Sessa himself testified that at one point he was so convinced that Scarpa was an informant that he dug up and moved the location of a murder victim so that Scarpa could not direct the FBI to him. Even if Sessa's belief on this matter was material to the jury's assessment of his testimony, disclosure was not necessary. It is well established that "no *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of exculpatory evidence." *United States v. Giaggi*, 811 F.2d 47, 59 (2d Cir.), *cert. denied*, 482 U.S. 929 (1987); *United States v. Grossman*, 843 F.2d 78 (2d Cir.1988), *cert. denied*, 488 U.S. 1040 (1989). Since this argument pertains only to Sessa's belief about Scarpa's status and not to the actual fact, the defendants had the essential knowledge available to investigate and bring out evidence on this issue.

Defendants argue that the evidence of Scarpa's relationship with the government could be used to show that Scarpa himself was not a co-conspirator and, thus, that the RICO charges against them must fail. However, proof of each defendant's membership in the Colombo family and agreement to participate in the war was overwhelming. Scarpa was but one among many with whom defendants

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12-17. * * *

[18] Whether confidence in the jury's verdict that each defendant participated or conspired to participate in the pattern of racketeering activity with which he was charged is considered separately below.

agreed. The only plausible issue raised is with respect to the individual racketeering acts with which each defendant was charged. It is to this issue that I turn next.

Defendants Theodore Persico, the Russos, and Lawrence Fiorenza were each charged with violations of 18 U.S.C. § 894, conspiracy to make extortionate extensions or collections of credit. The evidence does not show Scarpa to have been of any significance with respect to these charges. The evidence supporting these charges, while entwined with the factional war, details the exchange of money between the members of the enterprise. It included the receipt of a $15,000 share of Jimmy Angellino's loanshark proceeds by the Russos and Persico after Angellino's murder and extends to testimony of how Joseph Russo took over his father's loanshark operations, how Persico complained of how debts by William Cutolo were not being paid, and how Fiorenza was paid to make collections for Sessa and Joseph Ambrosino. The testimony relating to the Colombo family's loansharking operations was extensive, and each of these defendants was linked to these operations. Scarpa's statements as an alleged co-conspirator played a small role in proving these crimes. Though the new information regarding Scarpa and Sessa's beliefs about Scarpa's "angel" might have some impeachment value with respect to Sessa, the link between the theories on which he could be impeached and his propensity to lie with respect to these loansharking crimes is tenuous at best and is at best cumulative to the evidence previously available. The disclosures in no way undermine confidence in the jury's verdicts on these counts. Accordingly, defendants' motions for a new trial on these charges are denied.

Each defendant was also charged with firearms violations. However, an essential element of the federal firearms charges against the Russos, Monteleone, and Theodore Persico is the use or carrying of the weapon "in

relation to any crime of violence." 18 U.S.C. § 924(c).[19] Because the "crime[s] of violence" alleged in the indictment were the conspiracy to murder and the actual murders, whether or not the conviction on the firearms charges may stand directly depends on whether these other substantive charges stand as well.

* * *

The Court reaches a different conclusion with respect to Joseph Russo, Anthony Russo, and Joseph Monteleone. These individuals were charged with the murders of John Minerva and Michael Imbergamo and with conspiracy to murder. While I remain confident that the jury was correct in finding that these defendants were members of the criminal enterprise described in the indictment and participated in the conduct of the affairs of that enterprise by joining in the Persico war, I am not confident that the jury would have found that they did so by engaging in the specific pattern of racketeering activity with which they were charged, namely, a pattern which included the murders of Minerva and Imbergamo. After a review of the Scarpa 209s released by the government, my confidence in the verdict of guilty on these counts is substantially undermined, and a new trial is ordered as to these defendants.

The principal non-disclosures compelling this conclusion are the Scarpa 209s in which Scarpa blames other members of the Persico faction for murders he indisputably committed. As the government demonstrated at trial, once the shooting in this war began with the attempt on Scarpa's life, Scarpa and his crew killed Nicky Grancio, Vincent Fusaro, and Gaetano Amato and made attempts to kill Joel Cacace. Scarpa reported each of these crimes to the FBI, but he did so in a

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[19] Fiorenza was charged with being a felon in possession of a firearm, violating 18 U.S.C. § 922(g)(1). This conviction stands regardless of whether his conviction for a crime of violence is undermined by the Scarpa non-disclosures.

fashion casting blame on others. The December 11, 1991 209 blamed the Amato, Fusaro, and Cacace shootings on the "Persico faction." On January 8, 1992, he reported the Grancio murder as committed by the "Persico faction"; on January 14 he identified "Richie Fusco's crew" as the murderers and described the motive as follows: "[T]he source said it was done by Richie Fusco's crew, not only because of Grancio's position, but also because Grancio tried to have Fusco 'hit' several months ago." While the evidence at trial showed that, in January, Scarpa and Mazza attempted to kill Joe Baudanzo in order to "set an example" to the Russos and Theodore Persico (Tr. 3770), on February 3, 1992, Scarpa reported to the FBI that "there was a recent attempt to hit Joseph Baudanza by members of JoJo Russo's crew."[22]

On March 25, 1992, Minerva and Imbergamo were killed, and on March 31 Scarpa reported to the FBI: "[T]he hit on John Minerva was handled by JoJo and Chuckie Russo's people. The source said Michael Imbergamo, who was shot with Minerva, was a Colombo associate and was purposely taken out along with Minerva." Scarpa's report is inconsistent with Mazza's testimony of the Wolf's Deli meeting. While Mazza testified that the Russos admitted to the murder of Minerva and his companion, according to Scarpa, Anthony Russo neither knew nor cared who the other victim was. Scarpa, however, imputed both intent and motive to the Russos for Imbergamo's killing in a manner similar to his blame of Fusco for Grancio's murder.

The potential impact of these 209s on the jury's findings with respect to the Russos' and Monteleone's involvement in the murders resides in the government's reliance on co-conspirator statements explicitly attributed to Scarpa or which might have been traced to Scarpa as its principal

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20-21 * * *

[22] While it is not clear if Scarpa is referring to a subsequent attempt by the Russos, the argument could be made that he was endeavoring to mask his own attempt.

evidence of the Russos' involvement in these murders. Sessa was told of the Russos' culpability by Scarpa; he in turn told Ambrosino. The jury was informed of both of these Scarpa statements. Co-conspirator statements of other nonparticipants, Joseph Tomasello and Theodore Persico, also attributed the murders to the Russos and Minerva, but the source of that information was not explored and was arguably Scarpa. The potential for the arguments derived from the 209s to impeach Scarpa's credibility as a source of information to those responsible for the murders.

A substantial amount of evidence independent of Scarpa's co-conspirator statements remains to link the Russos and Monteleone to these murders; contrary to Anthony Russo's oft-repeated statistic, there are more than three pieces of evidence linking him to the murders. Joseph Russo had a substantial motive to kill Minerva both because of Minerva's defection to the Orenas and because of Minerva's substantial debt to his former captain. Physical evidence and non-accomplice testimony placed Monteleone, who had demonstrated ties to the Russos, near the scene of the murders. Most significantly, Sessa and Mazza testified that the Russos accepted congratulations for the murders. The scene of congratulations at Wolf's Diner might well appear to a jury in a very different light, however, if the jury concluded that Scarpa attributed murders to the Russos which Scarpa or some member of his entourage performed. In the context of the pressure being placed on the Russos and Sessa to 'answer the bell," i.e., participate actively in the war, the jury might not have found it implausible to look on the Russos' "acceptance of congratulations" as acceptance of the credit for a racketeering act in fact performed by others. Whether this would have been viewed by the jury as the commission of the racketeering act by the Russos and Monteleone themselves is not something that I can predict with any confidence.

As *Kyles* makes clear, *Brady* involves neither a sufficiency of the evidence test on the one hand nor requires the defense to show by a preponderance of the evidence that

the outcome would have been different on the other. It requires instead that the Court perform the much more difficult task of examining the non-disclosures in their entirety in light of the evidence presented at trial to determine whether confidence in the verdict is undermined. Based on the Scarpa 209s discussed above, I find that there is a reasonable probability of a different outcome in this case had the jury been aware of Scarpa's deviousness as revealed in the 209s. Thus a new trial of these defendants is necessary.

Having found the *Brady* standard to be met with respect to the specific murders with which the Russos and Monteleone were charged, the Court is compelled to direct a new trial with respect to the murder conspiracy charged as well. The independent and untainted evidence clearly demonstrates that the Russos were present at meetings having to do with the war and that Joseph Russo was appointed acting underboss of the family by Carmine Persico as the factions entrenched. It also links both Russos to plans to kill other Orena faction members. With doubt cast on their involvement in the Minerva and Imbergamo homicides, however, none of their other statements or acts makes a finding of guilt of conspiracy inescapable.

Similar reasoning undermines confidence in Monteleone's convictions as well. Nothing in the evidence about Scarpa's relationship with the FBI undermines the evidence that Monteleone was present at the scene of the murders at approximately the time they were committed or that Sessa had heard from another source that Monteleone had committed the crime. Still, Monteleone had evidence from which to argue that his presence at the scene was innocent — a friendship with the deceased which survived the war — and his defense would have been aided by the same logic that benefits the Russos: the fact that Scarpa lied to the FBI about some of his murderous activities gives rise to the inference that he lied about this one as well, making his lie all the more plausible in the case of Monteleone by taking advantage of his friendship with Minerva and presence at the scene.

Monteleone is entitled to a new trial on the murder conspiracy count as well. Though the record contains evidence apart from the Minerva and Imbergamo murders to link Monteleone to the murder conspiracy, it cannot be said with any degree of certainty that a jury acquitting Monteleone of these murders would still convict him as part of the conspiracy. Both Mazza and Sessa reported Monteleone's involvement in an attempt to kill Louis "Bobo" Malpeso, in which Tommy Gioeli was wounded in the hand. Miciotta testified to conversations with Monteleone in which he appears to look forward to the war as a means to increase his stature in the family. Nonetheless, a retrial is required on this count as well, because the most compelling evidence of his role and participation in the conspiracy is compromised.

The decisions of other courts that have faced similar issues do not compel a different result. Subsequent to the Alphonse Persico trial, at least four courts have had occasion to rule on the admissibility and relevance of Scarpa's relationship with the government. In November 1994, Judge Nickerson presided over the trial of William Cutolo and other members of the Orena faction under indictment for crimes related to the factional war. Judge Nickerson held that the evidence available did not support an entrapment defense and that evidence about Scarpa's receipt of information from the government "would hardly have added significantly to [defendants'] putative determination, aroused by their knowledge of Scarpa's blood thirsty character, to defend themselves." *United States v. Cutolo*, 868 F.Supp. 39, 41 (E.D.N.Y.1994). Evidence about Scarpa's informant status was held to be relevant proof at trial, however. In the case against Victor M. Orena, Judge Korman held that the entirety of Scarpa's relationship with the government was relevant and admissible, as it shed light on Scarpa's state of mind. His motivation, the court held, was relevant to rebutting or impeaching the government's theory of the war and the defendants' respective roles as members of the other alleged faction. On the other hand, in *United States v. Malpeso*, CR 93-1365(RJD), Judge Dearie declined to admit any of this

evidence. Ruling from the bench, he concluded that Scarpa's relationship with the FBI and De Vecchio was not relevant to the trial of the Orena faction members before him. He was given some pause by the possibility that Carmine Sessa might take the stand and indicated on the record that he might revisit such issues as relevant to Sessa's credibility. No ruling on that matter was required, however, since the government subsequently determined that neither Sessa nor Joseph Ambrosino would take the stand in that case. Similarly, in *United States v. Legrano*, CR 93-1231, Judge Ross kept out all such evidence because the indictment in that case charged the pre-war murder of Jimmy Angellino.

None of these cases is on all fours with respect to the defendants in this case. They were not hunted by Scarpa but, rather, were charged with planning and participating in murders alongside him. Defendants strenuously argue that this Court should follow Judge Korman's decision and hold the entire relationship relevant and admissible. However, Judge Korman's decision is not controlling for two reasons. First, the defendants in that case are not similarly situated with the defendants here; the "self-defense" defense employed in that case is not available to them. Second, and more important, the post-trial *Brady* inquiry is more stringent than a pretrial relevance or probative value determination. *See United States v. Payne*, 63 F.3d 2100, 1210-11 (2d Cir.1995) (failure to disclose affidavit that was "clearly relevant" does not require new trial where affidavit did not undermine confidence in the verdict), *cert. denied*, 116 S.Ct. 1056 (1996).

In reaching the above conclusions, I note that this case is unlike *Kyles*, and thus a new trial is not required for all the defendants. In *Kyles*, the non-disclosures pointed directly to the culpability of the government's primary witness in the case. The confluence of non-disclosures, including inconsistencies in the witness' story and inadequacies in the physical evidence, pointed suspicion away from the defendant and put the spotlight on the witness. The non-disclosures here are not of that character. The Scarpa issues

create a substantial argument that the government may have been misdirected with respect to the Minerva murders and charged the defendants with crimes they did not commit rather than the ones that they did. The non-disclosures are not of such a character as to threaten the integrity of the entire investigation and require a new trial for all of the defendants, as the case against other defendants was built upon the testimony of many witnesses and substantial physical evidence. However, Scarpa's misrepresentations about the Fusaro and Grancio homicides are sufficient to push the arguments made by the Russos and Monteleone passed the *Brady* threshold and require a new trial since they undermine confidence in the verdicts reached with respect to the crimes with which the defendants were charged.

Similarly, this result is consonant with the Court of Appeals' recent decision in *United States v. Payne*, 63 F.3d 1200. In Payne, the court found that an affidavit that could have been used to impeach a witness was relevant but not material under *Brady* and *Kyles*. The court examined the probable effect of the affidavit in the context of the evidence at trial. The court noted that, while it was likely that the affidavit "would have had a negative impact on the jury's willingness to rely on [the witness'] testimony," *id.* at 1210, the witness played only a small role in the conviction and that the conviction was further supported by strong physical evidence. *Id.* at 1210-11. While this analysis applies directly to the convictions of Persico and Fiorenza, for whom Scarpa's hearsay played only a small role when viewed in light of all the other evidence against them, it does not apply to the Russos and Monteleone. No physical evidence connects the Russos to the Minerva homicides. Such evidence is present to connect Monteleone to the scene of that crime, but it is not sufficiently compelling to outweigh the impact of the Scarpa disclosures.

Accordingly, a new trial is ordered for defendants Anthony Russo, Joseph Russo, and Joseph Monteleone on all charges, save those relating to conspiracy to make or collect extortionate extensions of credit.[23]

* * *

CONCLUSION

A new trial is ordered with respect to defendants Joseph and Anthony Russo and defendant Joseph Monteleone on Counts 1, 2, 5, 6, 9, and 12. Except as to that relief, all defendants' post-trial motions are, in all respects, denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

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[23] In addition to the above arguments based on *Kyles*, the defendants have argued that the decision of the Court of Appeals in *United States v. Abcasis*, 45 F.3d 39 (2d Cir.1995), in which it was held that the district court erred in failing to charge the jury on a defense of entrapment by estoppel. In that case, the defendant argued that he had thought he was authorized to act on the government's behalf in the course of a drug transaction, while the government argued that authorization had been terminated. The Second Circuit held that the defendants were permitted to put before the jury evidence of prior dealings and interactions with DEA agents during which the defendants were acting as informants. The court held that this evidence could have supported a defense of entrapment by estoppel. Defendants here argue that the question of whether Scarpa was authorized would have been helped by the information not disclosed until after their trial. Scarpa's subjective belief does not, however, exculpate the defendants; whether he believed he was authorized or not – and he did not, as his sentencing minutes demonstrate – his belief of authorization does not in any way extend to them. As discussed above, Scarpa's subjective belief and the facts that may or may not have created such a belief are material only in the sense that they undermine confidence in the verdict; and given the breadth of the evidence linking these defendants to the crimes at issue, this Court's confidence in the verdicts is not shaken except as noted.

24-29 * * *